CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF AND MOTION TO SUPPLEMENT COMPLAINT.

GEORGE W. DALZELL,
Counsel for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Jurisdiction	9
Questions presented	9
Statutes involved	10
Reasons for granting the writ	10
Prayer for writ	13
Brief in support of petition	15
Opinions below	15
Summary of argument	15
Argument	16
Point I	16
Point II	25
Point III	28
Conclusion	34
Appendix—The statutes involved	35

Regulations Involved.

Motion to supplement complaint	45

Table of Cases Cited.

A. F. L. v. *N. L. R. B.*, 103 F. (2d) 933, 70 App. D. C. 62, 308 U. S. 401	24
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 277	22
Anderson v. *Crawford*, 265 Fed. 504	28
Beuhring v. *United States*, 45 Ct. Cls. 404	19
Black v. *Linn.*, 17 S. D. 335, 96 N. W. 697	33
Boyd v. *Nebraska*, 143 U. S. 135	22
Boyd v. *Pendergast*, 57 Cal. App. 504, 207 Pac. 213	19
Britt v. *Snodgrass*, 66 Mo. 386	34
Brown, Matter of, 22 Op. A. G. 137	28
Burnap v. *United States*, 252 U. S. 512	19
C. B. & Q. R. R. Co. v. *Osborne*, 265 U. S. 14	32
Camp v. *Gress*, 250 U. S. 308	48
City Bank Farmers' Trust Co. v. *Schnader*, 291 U. S. 24	24

Page

Clark, Matter of, 2 Op. A. G. 414 28
Clark v. *Kelly*, 101 W. Va. 650, 133 S. E. 369 34
Coleman, Matter of, 7 Op. A. G. 436 28
Crowley, Matter of, v. *Fowler*, 217 App. Div. 16, 215 N. Y. Supp. 690 20
Dinsman v. *Wilkes*, 12 How. 390, 13 L. Ed. 1036 ... 12, 29, 32
E. Edelmann v. *Triple-A Specialty Co.*, 88 F. (2d) 852 ... 22
Egan v. *Philadelphia*, 113 Pa. Super. Ct. 93, 172 Atl. 183 .. 19
Ellett v. *Flood*, 64 N. Y. App. Div. 209, 71 N. Y. Supp. 1067 18
Emmitt v. *Mayor of New York*, 128 N. Y. 117, 28 N. E. 19. 19
Erwin Billiards Parlor v. *Buckner*, 156 Tenn. 278, 300 S. W. 565 22
Fertich v. *Michener*, 111 Ind. 472, 11 N. E. 605, 60 Am. Rep. 709 33
Fink v. *Finegan*, 170 N. Y. 356, 1 N. E. (2d) 462 20
Funkhouser v. *Coffin*, 301 Ill. 257, 133 N. E. 649 20
Garland, Ex parte, 4 Wall. 333 28
Garvey v. *Lowell*, 199 Mass. 47, 85 N. E. 182 20
Griffin, Matter of, v. *Thompson*, 202 N. Y. 104, 95 N. E. 7 .. 20
Hale v. *Worstell*, 185 N. Y. 247, 73 N. E. 1177 20
Harman v. *Tappenden*, 1 East, 562, 565, note 31
Honeyman v. *Hanan*, 300 U. S. 14 ..... 12, 48
Humphrey's Ex'r v. *United States*, 295 U. S. 602 20
Ingram v. *Jersey City*, 63 N. J. L. 542, 43 Atl. 445 20
Johnstone v. *Sutton*, 1 T. R. 493 33
Jones v. *Cody*, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160. 32
Kalbfus v. *Siddons*, 42 App. D. C. 310 20
Kansas City v. *Hyde*, 196 Mo. 498, 96 S. W. 201 33
Lamb v. *Redding*, 234 Pa. 481, 83 Atl. 362 32
Love v. *Commercial Casualty Ins. Co.*, 26 F. Supp. 481 ... 22
Marbury v. *Madison*, 1 Cranch. 137 22
Mayor, People ex rel., v. *Nichols*, 79 N. Y. 582 18
McCall v. *McDowell*, 1 Abbot (Fed. Cas.) 212 34
McCarthy v. *Emerson*, 202 Mass. 352, 88 N. E. 668 20
McClaughry v. *Deming*, 186 U. S. 49 28
Miguel v. *McCarl*, 291 U. S. 442 22
Milligan, Ex parte, 4 Wall. 2 27
Milligan v. *Hovey*, 3 Bissell (Fed. Cas.) 13 (C. C. Ind. 1871) 34

Page

Moore v. *Porterfield*, 113 Okla. 234, 241 Pac. 346..... 32
Morgan v. *United States*, 115 F. (2d) 990..... 20
Morgan v. *United States*, 298 U. S. 468, 304 U. S. 1. 4, 12, 19, 26
Myers v. *Bethlehem Corporation*, 303 U. S. 41..... 11, 23
Myers v. *United States*, 272 U. S. 52..... 20
N. L. R. B. v. *Cherry Cotton Mills*, 98 F. (2d) 444 28
N. L. R. B. v. *Ind. & Mich. Elec. Co.*, —U. S.—decided Jan. 18, 1943..... 24, 28, 49
O'Callaghan v. *O'Sullivan*, 1 Ir. R. 90..... 22
Nicholas v. *United States*, 257 U. S. 71..... 49
Okla. Gas. Co. v. *Russell*, 261 U. S. 290..... 24
Osterhedt v. *Philadelphia*, 113 Pa. Super. Ct. 8, 171 Atl. 100..... 19
Patterson v. *Alabama*, 294 U. S. 600..... 48
Perkins v. *Elg*, 307 U. S. 325..... 22
Petersen v. *Civil Service Board*, 67 Cal. App. 70, 230 Pac. 196..... 19
Powell v. *Alabama*, 287 U. S. 45..... 18
Roberts v. *United States*, 176 U. S. 221..... 22
Runkle v. *United States*, 122 U. S. 543..... 12, 26
Sawyer's Case, 124 U. S. 200..... 22
Shields v. *Utah R. R. Co.*, 305 U. S. 177..... 11, 22, 24
Simons v. *McGuire*, 204 N. Y. 253, 97 N. E. 526..... 20
Smith v. *Board*, 10 Colo. 17, 13 Pac. 917..... 33
Speyer v. *School District No. 1*, 82 Colo. 534, 261 Pac. 858.. 32
State v. *Thornton*, 136 N. C. 610, 48 S. E. 602..... 33
Texarkana v. *Arkansas Gas Co.*, 306 U. S. 188..... 49
Texas v. *Florida*, 306 U. S. 398..... 24
Truax v. *Raich*, 239 U. S. 33..... 11, 22, 23
Tyler v. *Pomeroy*, 8 Allen 480..... 28, 32
United States v. *Perkins*, 116 U. S. 483..... 12, 20
United States v. *Redgrave*, 116 U. S. 474..... 12, 20
United States v. *Wickersham*, 201 U. S. 390..... 12, 20
U. S. ex rel. Guest v. *Perkins*, 17 F. Supp. 177..... 18
Utah Fuel Co. v. *National Bituminous Coal Commission*, 306 U. S. 56..... 11, 22, 23
Van Meheran v. *Sirmyer*, 36 F. (2d) 876..... 28
Watts, Watts, & Co. v. *Unione Austriaca, etc.*, 248 U. S. 9. 48
Wall v. *McNamara*, 2 Carr & Payne, 158..... 30

Page

White v. *Berry*, 171 U. S. 366 22
White v. *Texas*, 310 U. S. 530 18
Wilkes v. *Dinsman*, 7 How. 89 ..... 12, 29
Wise v. *Withers*, 3 Cranch. 331 ..... 27, 28
Work v. *McAlester, etc. Co.*, 262 U. S. 200 22
Yealy v. *Fink*, 43 Pa. 212, 82 Am. Dec. 556 32

STATUTES CITED.

Judicial Code, section 240(a), as amended 9
Rule 9(b) of Rules of Civil Procedure 22
Rule 56 of Rules of Civil Procedure .....
Rule 57 of Rules of Civil Procedure 22
Rule 81(b) of Rules of Civil Procedure 22
U. S. C., Title 22, Sec. 23h 9, 10, 11
Sec. 23i 5, 9, 10, 11

OTHER AUTHORITIES CITED.

Borchard, Declaratory Judgments (1934) pp. 349–356 ... 22
38 Col. Law Rev. 1179 23
Field, Civil Service Law (1939), Ch. VIII to X, Incl. 20
Field, Civil Service Law (1939), Ch. IX 19
27 G. W. Law Rev. 892 24
Hart, Administrative Law (1940), pp. 490–492 22
House Report 2702, 71st Congress, 3rd Session 21
New Yorker Magazine, January 16, 1943, p. 22 et seq., January 23, 1943, p. 20 et seq. Senate Report 1069, 70th Congress, 1st Session 5
87 U. of Pa. L. Rev. p. 475, 609 23
45 W. Va. L. Q. 5 23
White, Government Career Service (1935), pp. 75–76 ... 22
Wig. Ev. Sects. 117 33

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

vs. *Petitioner,*

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ogden H. Hammond, Jr., respectfully shows to this Honorable Court:

I.

Summary Statement of Matter Involved.

This case involves important and novel questions of law concerning (1) the rights and responsibilities of lifetime career Foreign Service Officers of the United States, and

(2) proper methods of administrative hearing and procedure, with particular reference to the Foreign Service of the United States. These questions all arise on the dismissal of petitioner's complaint, and hence no question of fact is here involved.

Petitioner filed his complaint in the District Court of the United States for the District of Columbia on March 18, 1941 seeking mandatory, injunctive and declaratory relief against respondents on the following facts set forth under his oath in the complaint:

(1) Petitioner is a Foreign Service Officer of the United States, appointed by President Roosevelt and confirmed by the Senate, who took oath of office on March 22, 1939 (R. 3).

(2) Petitioner served as Vice-Consul in Vienna from April 3 to October 31, 1939, as Vice-Consul in Leipzig from November 1, 1939 to February 21, 1940, then in the Foreign Service Officers' Training School at the Department of State in Washington, D. C., from which he graduated in June, 1940, and then in the Division of Cultural Relations in the Department of State, Washington, D. C., until December 27, 1940 (R. 3). From December 27, 1940 until the filing of this complaint (March 18, 1941) petitioner was on leave of absence with pay (R. 3).

(3) On August 1, 1940 petitioner was duly promoted in grade in the Foreign Service and received a salary increase (R. 3). He received praise for his work at all times from his superiors, including respondents Berle and Shaw, until October 18, 1940 (R. 4).

(4) Petitioner was summoned to respondent Berle's office on October 18, 1940 and his resignation from the Foreign Service summarily demanded on the ground of two stories about him, (1) that he had publicly mimicked the President of the United States with particular emphasis upon the

President's physical affliction, and (2) that he had had disloyal dealings with a female agent of a foreign government (R. 4, 34-35). Despite petitioner's demands for details, names, and places none were given him but respondent Berle promised that he would investigate these matters in full and give petitioner details within two days (R. 4, 35).

(5) Nevertheless respondent Berle did not call petitioner again until October 31, 1940 when respondent Berle said "that he now knew the mimicry story was true because it had been witnessed by Cornelius Vanderbilt, Jr., and by his sister, Grace Vanderbilt Stevens (Mrs. Robert L. Stevens)" (R. 5), and that these two "had informed J. Edgar Hoover personally of the veracity of this story" (R. 5, 35-37). As to the female foreign agent, respondent Berle told petitioner that he was asking about petitioner's relations with one Lilly Stein in Vienna (R. 5, 36).

(6) These two stories concerning petitioner are vicious and false in every particular, as petitioner has solemnly sworn (R. 5, 6, 40). With the aid of friends, petitioner accumulated sworn evidence of the absolute falsity of the two stories, including sworn denials by Grace Vanderbilt Stevens (R. 43), Lilly Stein (R. 41-43), and Adelaide Whitehouse (R. 44), at whose home the mimicry was supposed to have occurred. At the same time petitioner told the full story as he knew it under oath (R. 30-41), and submitted the whole matter to respondent Shaw, the then Chief of Foreign Service Personnel, in a letter of November 14, 1940 (R. 29). This letter and its enclosures were no reply to charges as none had ever formally been made (R. 40-41, 54).

(7) In the meantime respondent Berle, despite his personal promises to the contrary (R. 5, 39, 46-51), formally preferred these two charges against petitioner to the Board of Foreign Service Personnel on November 6, 1940 (R. 5),

after having beguiled petitioner with maliciously false statements concerning his affection for petitioner and petitioner's family (R. 4, 37, 45).

(8) After November 14, 1940 all steps against petitioner were temporarily dropped (R. 6), and not until his reporting to respondent Shaw for active duty on February 17, 1941 after his leave of absence, did petitioner hear anything further (R. 7). At that time respondent Shaw forced petitioner to continue on leave and told him that unless his resignation was immediately forthcoming he would be tried in a Star Chamber proceeding on camouflaged charges of "temperamental unfitness" and "irresponsibility" (R. 7). Petitioner declined to resign (R. 7, 53) and demanded an investigation of the stories to reveal their falsity and unmask their perpetrators (R. 53, 37).

(9) Thereafter respondent Shaw in succession told petitioner a series of fantastic tales, all endeavoring to force him into resignation (R. 8-10, 19-20). Petitioner refused and in writing sought information from respondent Shaw as to the proper legal procedure to be followed, as well as continuing his efforts to secure an investigation of the two stories about him (R. 53-59, 61-64).

(10) The illegalities of the procedure followed and proposed to be followed in petitioner's case are fully set forth in the complaint (R. 9-18). (Parenthetically it may be noted that paragraphs 17 and 18 of the complaint (R. 14-18) are modelled exactly on paragraph IV of the complaint held by this Court in *Morgan* v. *United States,* 298 U. S. 468 and 304 U. S. 1, to state a good cause of action. The reason for using that as a model was that respondents' procedure and proposed procedure violated in each particular the rules announced in the *Morgan* case.)

(11) On March 14, 1941 petitioner was handed two letters (Exhibits G and H; R. 64-66) dated March 7, 1941 and

signed by respondent Shaw, by respondent Erhardt (R. 19-20), which rated petitioner as "unsatisfactory" and assigned him to Montreal, Canada as Vice-Consul for a period of probation. Previously petitioner had been informed of this by respondent Shaw who further informed him that the whole device was a scheme to throw him out of the Foreign Service (R. 8, 9-10) regardless of his merits.

(12) Respondents other than Berle and Shaw (*these two at all material times forming a controlling majority of two out of the three members of the Board of Foreign Service Personnel; R. 18, 24* [1]) are only necessary nominal defendants (R. 22). Respondents Berle and Shaw are actuated solely by personal malice and spite toward petitioner (R. 6, 9, 12, 16, 18, and 22), and have acted fraudulently, arbitrarily and capriciously against him (R. 6, 9, 11, 16, 18, and 22) in particulars detailed in the complaint and in other manners which will be shown at trial if this complaint is reinstated by this Court.[2] Respondent Shaw on the eve of filing the complaint herein sought by threats to deter petitioner from resort to the courts (R. 21).

(13) Petitioner's rating of "unsatisfactory" was never confirmed by the Secretary of State as specifically required by Section 23i of Title 22, U. S. C. (R. 12, lines 13-18; R. 13, lines 2-14; R. 18, sub-paragraph 9). Neither the President nor the Secretary of State have ever taken any action against petitioner, but on the contrary each has declined to do so.

---

[1] Emphasis ours throughout unless otherwise noted.

[2] E. g., attempted intimidation of petitioner's witnesses, misdirection of petitioner's mail to his detriment, illegal removal of petitioner from payroll, and blocking petitioner in private employment and gainful financial enterprises (this latter by Berle). For an outside view of respondent Berle, see *New Yorker Magazine,* January 16, 1943, p. 22 *et seq.,* January 23, 1943, p. 20 *et seq.*

(14) On March 18, 1941 petitioner filed his complaint seeking judicial relief (1) to compel administrative procedure in accordance with law, and (2) to direct respondents to accord him his statutory rights (R. 24-27). The complaint is verified (R. 28) *and is undenied.* If trial is ordered by this Court petitioner stands ready to prove his complaint by many reputable and responsible witnesses, as well as by documentary evidence.

(15) A motion for temporary injunction was filed with the complaint (R. 72). On March 24, 1941, respondents moved to strike and dismiss the complaint (R. 73) which motion necessarily admitted all allegations of the complaint. An oral hearing was held before Mr. Justice O'Donoghue in the District Court on March 25, 1941, at which affidavits by respondents Berle, Long, Acheson, Shaw and Erhardt were submitted in opposition *only to the motion for temporary injunction* (R. 74-87). (Parenthetically it is to be noted that these affidavits which go only to the motion for temporary injunction *not made here* and of only academic import since April 17, 1941 as explained hereinafter, are included in this record over petitioner's protest (R. 129-131). Unless these were included, the Solicitor General refused to sign the stipulation permitting the filing of this record (R. 132). This makes a unique record in the case of a dismissed complaint before this Court, and if certiorari is granted we shall move to reframe the record.) [3] On

[3] These affidavits nowhere deny the fraud, malice, intent or actions of respondents Berle and Shaw, and present only three additional points: (1) An alleged verbal warning by Shaw to petitioner on November 8, 1940; (2) An alleged "informal understanding" between respondent Long and petitioner's father on November 16, 1940 as to the possibility of petitioner's resignation from the Foreign Service; and (3) The alleged "formal" action of the Board on March 5, 1941 rating petitioner as "unsatisfactory" and the alleged confirmation thereof by the Secretary of State *on March 7, 1941.* The first two of these points are completely shattered by affidavits of petitioner dated April 4 and 10, 1941, and of

March 29, 1941, Mr. Justice O'Donoghue filed his opinion (never reported) dismissing the complaint upon the ground it was premature and denying the temporary injunction (R. 88-89). Findings of fact and conclusions of law (R. 91-92) were filed on the motion for temporary injunction only and petitioner's proposed finding or conclusion denied (R. 90) on March 31, 1941. On that day final judgment was entered dismissing the complaint (R. 93).

(16) On April 1, 1941, petitioner filed his appeal to the Court of Appeals (R. 94). In the Court of Appeals various motions, including motions to advance, to supplement the complaint, to remand for rehearing upon the supplemental complaint, and for temporary injunction were made and denied prior to argument on March 9, 1942. In all it took more than eighteen months for this case to proceed through

---

his father dated April 1, 1941, duly submitted to the Court of Appeals on the motion for temporary injunction in that court, denied April 16, 1941. (It is to be noted that the renewal of this motion for temporary injunction in the Court of Appeals was the only reason for the original inclusion of respondents' affidavits in the record. It is obviously highly improper to have them in this record when no such motion for temporary injunctive relief is made here, and it is ludicrous to ask this Court to pass on the truth or falsity of the material therein contained in view of the exclusion from the record of all petitioner's contradictory material.)

The third point as to the alleged confirmation by the Secretary of State is a critical point at issue here, for if respondents desired to avoid hearing upon this point they should be compelled to resort to the appropriate procedure by summary judgment (Rule 56 of the Rules of Civil Procedure) or otherwise, *and should not be permitted to introduce their own proof and exclude petitioner's proof. Petitioner has proof available to show the falsity of the alleged confirmation by the Secretary of State.* It is to be noted that this asservation appears only in the affidavits of respondents Berle, Shaw and Acheson, but is omitted from that of respondents Long and Erhardt. Likewise, the most significant fact of all is not only the omission of any affidavit or statement of similar import from the Secretary of State but the inclusion of a letter from him to petitioner stating *on March 10, 1941*—or in other words, three days after the alleged confirmation of the probationary order—that he still had the matter under consideration (R. 69). It is apparent that the internal dealings of the Department in this matter, in view of this confused state of the record, should be inquired into upon formal hearing.

the Court of Appeals to final judgment, that is from April 1, 1941 to October 12, 1942 (R. 97, 104-105). The opinion of the Court of Appeals by Mr. Justice MILLER affirming the judgment of dismissal (R. 97-103) is reported in 131 F. (2d) 23. The general theory of the opinion is also one of prematurity of complaint. Petitioner filed a full petition for rehearing which points out the errors and omissions of the opinion (R. 104-120). Petitioner also sought to secure a decision from the Court of Appeals upon his undecided motion to supplement his complaint and moved accordingly (R. 121-123, 126-128). After consideration both these motions were denied without opinion by the Court of Appeals on November 7, 1942 (R. 128-129). This application for certiorari follows and is timely. The sole question upon the application is whether the complaint states a good cause of action.

(17) In the long interval consumed in the Court of Appeals much was done to harm petitioner by respondents Berle and Shaw. Within two hours after the denial of his motion for temporary injunction in the Court of Appeals on April 16, 1941, his name was stricken from the payroll by respondent Shaw. See R. 123 and motion to supplement the complaint attached hereto which relates the facts that have happened to date. (By reason of the prior decisions of this Court cited in that motion, we believe this material is properly brought to the attention of this Court.) Petitioner has no desire whatever to impede the Administration or the Department of State in these crucial times but only to secure that elementary personal justice for which we are all now fighting (R. 61), and in conformity with his beliefs in this matter, enlisted as a private in the Army of the United States on December 15, 1942 with the full permission of the Department of State. If certiorari is granted herein and the complaint reinstated for trial by this Court, it is peti-

tioner's intention to secure the adjournment of the hearing until after the war, under the Soldiers' and Sailors' Civil Relief Act of 1940 as amended in order not to embarrass the Department of State.

II.

Jurisdiction.

Petitioner's timely-filed petition for rehearing was denied by the Court of Appeals on November 7, 1942 (R. 129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III.

Questions Presented.

On the facts of this case as stated in the complaint (R. 1-71), the following questions are presented:

1. Is the procedure followed by respondents in petitioner's case the proper and lawful statutory procedure commanded by Sections 23h and 23i of Title 22 of the United States Code?

2. Does the failure of the Secretary of State to confirm the efficiency rating of a Foreign Service Officer as "unsatisfactory", as required by Section 23i of Title 22 of the United States Code, render it unlawful to place such Foreign Service Officer on an unsatisfactory status and to notify him officially thereof?

3. Does the existence of actual malice in an administrative official, with his official actions exclusively guided by such malice, subject such official to judicial interference in either his public or his private capacity?

4. In view of the fact that petitioner charges on oath and with particularity that he will be granted no fair or lawful administrative hearing, and that his evidence will not be taken or heard, is the present complaint premature?

5. Does the complaint herein state a good cause of action against the respondents or any of them?

6. Should the complaint herein be supplemented as requested by motion hereto attached?

IV.

Statutes Involved.

The statutes and regulations involved herein concerning the Foreign Service of the United States are collected in Title 22 of the United States Code, and in Title 22 of the "Code of Federal Regulations of the United States of America." Because of the length of the applicable statutes and regulations, they are set forth as the Appendix to the brief in support of this petition.

V.

Reasons for Granting the Writ.

1. The question of the status, rights, duties and responsibilities of career Foreign Service Officers of the United States is a generally important one which has not been but should be settled by this Court. Likewise the facts of the instant case present questions of substance relating to the proper construction of Sections 23h and 23i of Title 22, U. S. C. which have not been but should be settled by this Court. The small size of the lifetime career Foreign Service of the United States (about 800 members) and the importance of the work with which they are entrusted, namely

that of carrying on the diplomatic relations of the United States, make it important that their rights should be definitely settled by final decision of this Court. This is particularly true in view of the fact that the Congress of the United States, after consolidation of the consular and diplomatic services into the Foreign Service, later had occasion (1927) in a thorough Senate investigation of the Department of State, to find fraud and favoritism rampant there (Senate Report 1069 of the 70th Congress, 1st Session). The Congress then proceeded (1931) to write new safeguards into the Foreign Service statutes, namely Sections 23h and 23i of Title 22, U. S. C. in question here (House Report 2702, 71st Congress, 3rd Session). The proper interpretation of these statutes has been and is now a matter of debate in the Department of State and a matter of great personal concern to each Foreign Service Officer. See R. 108-110 for a more complete delineation of the statutory problems here involved.

It is a matter of common knowledge that the instant case since its inception has been and is of great public interest. There is also presented a generally important question which has not been but should be settled by this Court as to whether verified and detailed allegations that a plaintiff will be denied a fair administrative hearing entitles him to a judicial hearing *to determine the proper procedure to be followed in the administrative hearing to be held.* See *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56, 59-60; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41, 47; *Shields* v. *Utah R. R. Co.,* 305 U. S. 177; *Truax* v. *Raich,* 239 U. S. 33, 36-39.

2. The United States Court of Appeals for the District of Columbia in its decision herein has not given proper effect to the applicable decisions of this Court which (1) lay down the rules requiring administrative officials to follow statu-

tory procedure outlined by Congress, and (2) establish the rule that personal malice influencing or determining official action is ground for proceeding against a public official in his public capacity. The decisions of this Court which were not given the proper effect by the Court of Appeals are: (1) *Morgan* v. *United States*, 304 U. S. 1; *Runkle* v. *United States*, 122 U. S. 543; *United States* v. *Redgrave*, 116 U. S. 474; *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Wickersham*, 201 U. S. 390, all with reference to following the statutory procedure outlined by Congress, and (2) *Wilkes* v. *Dinsman*, 7 How. 89 and *Dinsman* v. *Wilkes*, 12 How. 390, with reference to the proper rule on malice. In fact the Court of Appeals found it convenient to dispose of the instant case without reference to any of these decisions of this Court pressed upon it as controlling. This is dubious jurisprudence. See *Honeyman* v. *Hanan*, 300 U. S. 14.

3. The personal injustice and the extraordinary errors committed by the lower courts in their method of interpreting the complaint and the record herein should impel this Court to exercise its supervisory power to maintain a uniform federal judicial system. Admittedly if any complaint by one Federal official against others can state a valid cause of action, this complaint does so. If the rule is to be established in the United States that no subordinate Federal official can have any recourse to the courts against his superiors even though statutes of Congress have been and are being plainly violated, then that rule of law should be directly established by judicial decision, rather than that the law of procedure for interpreting a complaint, and the rules established by this Court as the Rules of Civil Procedure for the conduct of the lower courts of the United States, should be mangled and distorted in order to reach a result believed to be desirable. See our petition for rehear-

ing in the Court of Appeals (R. 104-120), which we believe fully limns the singular deficiencies in the opinion of that court.[4]

Prayer.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings had in said United States Court of Appeals for the District of Columbia in the case therein entitled "Ogden H. Hammond, Jr., Appellant, *v.* Cordell Hull, Adolph A. Berle, Jr., Breckinridge Long, *et al.*, Appellees, No. 7871", to the end that said case may be reviewed and determined by this Court, as provided by law, that the judgment of said court be reversed, and that your petitioner have such other and further relief as to this Honorable Court may seem just and proper.

OGDEN H. HAMMOND, JR.,
By GEORGE W. DALZELL,
Attorney for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

[4] Record references in the rehearing petition are denoted as "Appellant's App. p. —," but the page references are identical with those of the record here.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the District Court (R. 88-89) is unreported. The opinion of the Court of Appeals (R. 97-103) is reported in 131 F. (2d) 23. The statutes involved are set out as the Appendix to this brief. The jurisdiction of this Court, the statement of the case, and all other preliminary matters have been set forth in the foregoing petition.

Summary of Argument.

POINT I.

The lower courts erred in their interpretation and construction of Sections 23h and 23i of Title 22 of the United States Code.

POINT II.

The lack of confirmation by the Secretary of State of petitioner's rating as "unsatisfactory" rendered such rating null and void.

POINT III.

The rule of the Court of Appeals that the existence of actual malice in a public officer is immaterial and does not subject such officer to any judicial review is contrary to the established law of this Court and is without precedent anywhere.

ARGUMENT.

POINT I.

The lower courts erred in their interpretation and construction of Sections 23h and 23i of Title 22 of the United States Code.

Sections 23h and 23i are set out in full in the Appendix to this brief. Petitioner claims that he has been denied his rights under both sections as fully alleged in the complaint.

Section 23h. Petitioner says that under 23h he was entitled to be presented with charges and have an opportunity to reply thereto before being placed on probation. Thus the statutory words "no charges" mean "no thing", since as Webster defines the word "charge" it is "the laying of a thing to the account of another; imputation; accusation" and the example given by Webster is a quotation from Whewell, "the *charge* of confounding together very definite classes of phenomena". The word "reply" means, according to Webster, "to answer" and "in writing", while the example given is from Shakespeare, "Give me *hearing* what I shall *reply*".

No pretense is made by respondents that any opportunity to reply to charges was ever given petitioner, either on the two false stories or on "temperamental unfitness" and allied charges. Instead respondents say 23h is a bifurcated section providing for a rating of "unsatisfactory" by either "charges" (not used here) or by "review of the record", which was used here. We say this is contrary to the purport of the statute and the intent of Congress as discussed below. Respondents' argument of bifurcation has no support in the statute or its history, but is an ingenious idea of counsel fitted to the *fait accompli* of Berle and Shaw. Respondents assert a completely arbitrary interpretation of Section 23h, one which the very statutes they attempt to interpret are aimed against. Congress specifically legislated against such dual or bifurcated procedure. The methods of dismissing an officer from the Foreign Service do not and were not intended to vary with the offense charged against him, whether general or specific. As is apparent from the statutory history, the intention of Congress was to enact a *double protection* for Foreign Service officers selected by examination, then appointed by the President and confirmed by the Senate, (1) the Civil Service protection accorded in similar cases in *all types of cases* under Section 23h, making no distinction between a review of the record as against the preferment of specific charges but rather intending that nothing should be taken into consideration in reviewing the record that was not referred to the officer concerned for reply, and (2) the full and formal hearing before the Secretary of State personally, required by Section 23i. See Senate Report No. 1069 of the 70th Congress, First Session, and House Report No. 2702 (1931).[5] It was the intention of Congress, in other words, to vest in lifetime career officers of the

[5] Other hearing references are contained in Note 14 to the opinion of the Court of Appeals (R. 101).

Foreign Service a right to their position similar to that of every army and naval officer in the enjoyment of their positions in the armed services without regard to changing political conditions, and it is this right which petitioner claims is violated in his case. The contrary interpretation asserted by respondents is arbitrary and dictatorial, contradictory of the intent of Congress, and in this instance an *ad hominem* contrivance on the part of Berle and Shaw. See the complaint, *passim* (R. 1-71). Respondents and petitioner alike are creatures of Congress, and it is incumbent upon them all to respect the will of Congress as manifested in its statutes, reports, and hearings. (*Cf. United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 181.)

The consistent denial by respondents of petitioner's right to counsel in every step of their proceedings is sufficient to vitiate these proceedings in their entirety. The right to counsel is fundamental. See *Powell* v. *Alabama*, 287 U. S. 45, 67 *et seq.*; *White* v. *Texas*, 310 U. S. 530; and following cases in this Court. At this point of the argument the pertinent proposition is, however, that the phrase "except after the officer shall have had opportunity to reply thereto" (to "charges") (Section 23h) requires an opportunity to be represented and heard by counsel as often demanded by petitioner and invariably refused by respondents. Thus in *People ex rel. Mayor* v. *Nichols*, 79 N. Y. 582, under a statute which authorized the Mayor of New York City to remove the Police Commissioner "for cause and after opportunity to be heard" the proceeding was held to be a judicial one, with right to counsel, and hence reviewable by certiorari. Likewise in *People ex rel. Ellett* v. *Flood*, 64 N. Y. App. Div. 209, 71 N. Y. Supp. 1067, a statute providing that firemen held office during good behavior or until the Board of Fire Commissioners should decide that they were incompetent or inefficient and for such reason order their

removal also required the Board of Commissioners to permit firemen "to defend by counsel" and solely for violation of that right a fireman's removal was held void. See also *Morgan* v. *United States,* 298 U. S. 468, 480. The right to counsel in all administrative proceedings is assumed to be inherent by the Attorney General's Committee and respondent Acheson. See "Final Report of the Attorney General's Committee on Administrative Procedure", *passim.* Further excerpts of interest in the instant case from this Report are to be found at pages 62, 63, 64-65, 67, 68, 72, 76, 77-78, 78, 78-79, 80-81, 88 thereof.

Section 23i. It is undeniable that Section 23i in terms requires (1) confirmation by the Secretary of State of probationary status (dealt with in Point II of this brief), and (2) a hearing by the Secretary of State personally before ouster. (And indefinite leave of absence without salary is ouster as is well settled by unanimous case authority.[6]) No pretense is made that any hearing was ever given petitioner, although often demanded. Petitioner is entitled to immediate reinstatement in good and satisfactory standing with full salary from April 17, 1941 onward, because of the violation of his statutory right to a full hearing, pending procedure against him by respondents in substantial com-

---

[6] Leave of absence without salary, over objection, is a suspension and in the absence of a special statute suspension *without pay* is a removal from office and is governed by the rules applicable to such removals. *Beuhring* v. *United States,* 45 Ct. Cls. 404; *Boyd* v. *Pendergast,* 57 Cal. App. 504, 207 Pac. 213; *Emmitt* v. *Mayor of New York,* 128 N. Y. 117, 28 N. E. 19; *Egan* v. *Philadelphia,* 113 Pa. Super. Ct. 93, 172 Atl. 183; *Osterhedt* v. *Philadelphia,* 113 Pa. Super. Ct. 8, 171 Atl. 100; *Petersen* v. *Civil Service Board,* 67 Cal. App. 70, 230 Pac. 196; authorities collected in Field, *Civil Service Law* (1939), Ch. IX. See also *Burnap* v. *United States,* 252 U. S. 512, esp. at 520. Our motion to supplement the complaint, attached hereto, appropriately raises all these questions for the consideration of this Court. This (R. 123) also disposes of the "prematurity" argument upon which respondents Berle and Shaw and the lower courts have leaned so heavily.

pliance with statutory requirements. Authorities directly in point on this proposition are:

United States v. *Redgrave*, 116 U. S. 474;
United States v. *Perkins*, 116 U. S. 483;
United States v. *Wickersham*, 201 U. S. 390;
Kalbfus v. *Siddons*, 42 App. D. C. 310.

See also:

Humphrey's Ex'r v. *United States*, 295 U. S. 602;
Myers v. *United States*, 272 U. S. 52, 160-1, 171-4.
Cf. Morgan v. *United States*, 115 F. (2d) 990, *cert. den.* March 17, 1941.

No question of the removal power of the President or the Secretary of State is here involved, however, as the President has never acted in this case and the Secretary has refused to act personally.

The discharges of public officers or employees without fair hearing as required by statute are always avoided by the courts: *Garvey* v. *Lowell*, 199 Mass. 47, 85 N. E. 182; *Matter of Griffin* v. *Thompson*, 202 N. Y. 104, 111, 95 N. E. 7, 9; *Matter of Crowley* v. *Fowler*, 217 App. Div. 16; 215 N. Y. Supp. 690; *Funkhouser* v. *Coffin*, 301 Ill. 257, 133 N. E. 649; *Ingram* v. *Jersey City*, 63 N. J. L. 542, 43 Atl. 445; *McCarthy* v. *Emerson*, 202 Mass. 352, 88 N. E. 668; *Hale* v. *Worstell*, 185 N. Y. 247, 73 N. E. 1177; *Fink* v. *Finegan*, 270 N. Y. 356, 1 N. E. (2d) 462; *Simons* v. *McGuire*, 204 N. Y. 253, 97 N. E. 526.

State cases to the same effect might be multiplied indefinitely but are adequately collected in Field, *Civil Service Law* (1939), chaps. VIII to X, inclusive. Respondents' disregard of the statutory procedure commanded by Congress in petitioner's case is flagrantly illegal and should be so declared.

Here the history of the Foreign Service should be considered. This is briefly adverted to in the opinion of the Court of Appeals (R. 100-102) and in the petition for rehearing (R. 108-110). The Civil Service of the United States had its origin in the Pendleton Act of 1883 (*Myers* v. *United States, supra*), and the idea of the merit system spread gradually in the federal government culminating, so far as the Department of State was concerned, in a series of Executive Orders from 1909 to 1915 blanketing in both diplomatic and consular officers of minor grades. Finally in 1924 came the Rogers Act, consolidating both diplomatic and consular services into one lifetime career service known as the Foreign Service of the United States. Defects in the administration of this Act, mostly fraud and favoritism, in the highest State Department officials, were exposed in a Senate investigation of 1927. See Senate Report 1069 of the 70th Congress, 1st Session. With this report came a recommendation for new safeguards to be written into the Rogers Act, *and the heart of these proposals were Sections 23g, 23h, and 23i. All these sections were newly added in 1931.* These were adopted in 1931 with a conference report (House Report No. 2702 of 1931), which shows conclusively the dominant intent of Congress to protect Foreign Service officers such as the petitioner.

The conference report on Section 23i reads as follows:

> "This section contains a much needed provision establishing an equitable method for the involuntary retirement of unsatisfactory officers upon an appropriate annuity, or a bonus of one year's salary (depending upon the officer's age at retirement). *Adequate provision is made for previous warning concerning unsatisfactory work and for granting a hearing to officers before such involuntary separations.*"

This would seem to be conclusive as to the intent of Congress in the enactment of Section 23i. See for further his-

tory of the Foreign Service, White, *Government Career Service* (1935), pp. 75-76.

Legislation in 1939 only liberalized certain annuity provisions and in no way affects the Act of 1931 on which petitioner relies. Applicable Executive regulations under the Act are set out in full in the Appendix, and merely add to the measure of petitioner's rights so flagrantly violated here.

The position of petitioner on this matter is simple: he is conscious that he is right as *a matter of fact*, and believes that there are ample provisions of law, both statutory and judicial, to assist him. Certainly the remedies he seeks are proper—mandamus,[7] injunction,[8] and declaratory judgment[9]—since they are a direct, not a collateral or personal, attack upon the official action of respondents Berle and Shaw. The complaint is sufficiently definite in its charges in view of the provision of Rule 9 (b) of the Rules of Civil Procedure that: "*Malice, intent, knowledge, and other condition of mind of a person may be averred generally*". (See *Love* v. *Commercial Casualty Ins. Co.*, 26 F. Supp. 481, 482.) The elements of fraud are averred with particularity in the facts stated in the verified complaint and in the mo-

---

[7] Rule 81(b) of the Rules of Civil Procedure; *Marbury* v. *Madison*, 1 Cranch 137, 170; *Roberts* v. *United States*, 176 U. S. 221, 229-231; *Work* v. *McAlester, etc., Co.*, 262 U. S. 200, 208-209; *Miguel* v. *McCarl*, 291 U. S. 442, 451-452. See also Field, *op. cit. supra*, at pp. 230-235.

[8] *Utah Fuel Co.* v. *Natl. Bit. Coal Comm.*, 306 U. S. 56; *Shields* v. *Utah R. R. Co.*, 305 U. S. 177; *Truax* v. *Raich*, 239 U. S. 33. *Cf. White* v. *Berry*, 171 U. S. 366, 376, *Sawyer's Case*, 124 U. S. 200, 223, and *Boyd* v. *Nebraska*, 143 U. S. 135.

[9] *Perkins* v. *Elg*, 307 U. S. 325, 349-350; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 277; Rule 57 of the Rules of Civil Procedure, and Note of the Advisory Committee thereto; Hart, *Administrative Law* (1940), at pp. 490-492. See also *O'Callaghan* v. *O'Sullivan* (1925) 1 Ir. R. 90; *E. Edelmann* v. *Triple-A Specialty Co.*, 88 F. (2d) 852, 853 *et seq., cert. den.* 300 U. S. 680; *Erwin Billiards Parlor* v. *Buckner*, 156 Tenn. 278, 300 S. W. 565; Borchard, *Declaratory Judgments* (1934), pp. 349-356, 402-403, 601-603, 609-611, and authorities therein collected.

tion to supplement the same (R. 123), *and are nowhere denied by respondents Berle and Shaw.* To paraphrase Mr. Justice CARDOZO, the conduct of Berle and Shaw is "instinct" with fraud.[10]

Petitioner's position is easy to understand. Berle and Shaw have sought to ruin his reputation with two false and vicious stories, *solely emanating from them.* When shown sworn proof that these stories were untrue, Berle and Shaw abandoned them *without denying them*—and then have sought to force petitioner's resignation or dismissal on other charges, albeit out of caution, this time of a vaguer variety. Thus Berle and Shaw would not only persist in destroying petitioner but would by inference reaffirm the truth of the two scandalous stories already disproved. If this is not fraud, no other name can be found to fit it.

What has been said is sufficient to demonstrate that both as a matter of interpretation of the complaint and as a matter of the construction of the Rules of Civil Procedure the allegations of fraud, malice, intent and conspiracy against respondents Berle and Shaw are well averred. It is settled law that if this conclusion is correct the rule requiring administrative finality does not apply and both equity and declaratory judgment will protect a victim from the successful consummation of such illegal schemes even where they are still in the process of execution by administrative officials. This is well settled law. See *Utah Fuel Company* v. *National Bituminous Coal Commission,* 306 U. S. 56, 59-60; *Myers* v. *Bethlehem Corporation,* 303 U. S. 41, 47; *Truax* v. *Raich,* 239 U. S. 33, 36-39, and authorities there cited. See Notes, 87 U. of Pa. L. Rev. at 475, 609. Respondents in the lower courts laid great stress on *Myers* v. *Bethlehem*

---

[10] For general discussion of the purpose, scope, and operation of the Rules of Civil Procedure, see 45 *W. Va. L. Q.* 5 and 38 Col. Law Rev. 1179.

Corporation, supra, but we point out that Mr. Justice BRANDEIS in the opinion of the Court expressly excepted from the rule of "prematurity" the cases where allegations of proposed improper conduct or proposed improper hearing by administrative officials were made:

> "There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; *or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied"* (303 U. S. at 47).

These allegations are specifically made in this complaint and particularly in paragraphs 17 and 18 thereof (R. 14-18). Reference is made to a note in 27 *G. W. Law Rev.* 892, which reconciles all of the decided cases by this Court on this express basis. See also *Shields* v. *Utah, Idaho R. R. Co.,* 305 U. S. 177, and *A. F. L.* v. *N. L. R. B.,* 103 F. (2d) 933, 936, 70 App. D. C. 62, 65, affirmed 308 U S. 401, 412. On this point the decision of this Court in *N. L. R. B.* v. *Ind. & Mich. Elec. Co.,* decided January 18, 1943, is also pertinent. Hence it follows that the allegations of this complaint are not subject to being stricken for prematurity, and that the action of the lower courts was erroneous in this respect. *Cf. City Bank Farmers' Trust Co.* v. *Schnader,* 291 U. S. 24; *Texas* v. *Florida,* 306 U. S. 398; *Okla. Gas Co.* v. *Russell,* 261 U. S. 290, 293, per *Holmes, J.*

In any event it is perfectly clear that by any accepted test of "prematurity" this action is not *now* premature and has not been since April 17, 1941 when petitioner *over his objection* was stricken from the payroll informally by respondents. See *supra* note 6.

Hence there is no good reason in either fact or law to deny petitioner direct relief against the illegal actions of

respondents Berle and Shaw. Their attempts to hide behind the great names of the President and the Secretary of State deceive no one except themselves. Accordingly the statutes enacted by the Congress with just such a situation as this in mind should here be enforced to the full.

Point II.

The lack of confirmation by the Secretary of State of petitioner's rating as "unsatisfactory" rendered such rating null and void.

The complaint formally charges that the alleged probationary order (Exhibit G to the complaint; R. 64-65) was never confirmed by the Secretary of State as specifically required by Section 23i of Title 22 of the United States Code. See paragraph 15 of the complaint (R. 13), and paragraph 18 (9) (R. 18). Thus it is specifically charged that petitioner's purported rating of *unsatisfactory* "has never been confirmed by the Secretary of State in accordance with the requirements of the said statutes" (R. 13). Furthermore this contention (R. 64-65) is borne out by the form of Exhibit G which contains no recital that the rating of unsatisfactory was ever confirmed by the Secretary of State, shows no evidence on its face or elsewhere that the Secretary of State ever saw this or any similar document, and is signed "For the Secretary of State: G. Howland Shaw." Stated to be based upon "a review of your record" (R. 64), "this instruction" purported to serve as "official notification to you of your unsatisfactory rating" (R. 65), but not of its confirmation by the Secretary. Likewise it is to be noted that the Secretary of State not only has refused to claim this document as his own, but his only utterance herein belies that it is his (R. 69). Authority is scarcely needed to show that such allegations state a good cause of action.

The leading case is, of course, *Morgan* v. *United States*, 304 U. S. 1, where this Court reversed a determination of a specially constituted district court and held that Vice-President Wallace, the then Secretary of Agriculture, had denied appellants a fair hearing in that an Assistant Secretary of Agriculture had heard and weighed the evidence while the Secretary of Agriculture had signed the order. This Court held such action to be an illegality patent on the face of the order rendering it void. See 304 U. S. at 17-22; 304 U. S. 23-26. See also the first *Morgan* case, 298 U. S. 468, 477-479. Here an even stronger case is presented since Section 23i *three times* commands action by the Secretary of State *personally.*

The earlier case of *Runkle* v. *United States*, 122 U. S. 543, is most pertinent. There an order of a court-martial convicting one Major Runkle of embezzlement was required by the applicable statute to be affirmed by the President of the United States. The order purporting to convict and dismiss the said Major Runkle (reported in 122 U. S. at 547) recited that the findings of the court-martial were approved (without saying "by the President") and even contained a statement that "The President is pleased to remit" a certain portion of the court-martial sentence, and were signed by the Secretary of War. On this record in a suit for salary this Court unanimously held the sentence of the court-martial void because it had never been properly confirmed by the President. Not doubting that the President might act through the heads of the executive departments, the opinion of the Court specifically points out that it did not *affirmatively* appear from the dismissal order that the President had approved the sentence as required by statute. See 122 U. S. at 558 *et seq.* Referring to the portion of the order in which the President had exercised clemency in Runkle's case the Court pointed out that this was not the

clear affirmation which statute and Constitution require. See 122 U. S. at 559. In the language of the Court:

> "Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution." * * *
>
> * * * * * * *
>
> "* * * But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not *a mere departmental order* which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only." (122 U. S. at 560, 561.)

The whole contention of petitioner on this point is that the Department of State (*i. e.*, respondents Berle and Shaw) is acting through the medium of a "mere departmental order" when the statute three times requires action by the Secretary of State personally. See Section 23i *infra*, Appendix. This is true both in regard to the probation order and in regard to the summary suspension of petitioner without salary which was in substance and effect an illegal removal from office. See cases and authorities cited *supra*, note 6. That action must be taken personally by the Secretary of State is established both by the *Morgan* case and by the *Runkle* case, and it is on these cases and the plainly applicable analogy of military law that we rely.

Other cases in the analogous field of court martials in the Army and in the Navy showing fatal jurisdictional defects in the composition or conduct of such tribunals, rendering any judgment or order thereof void are: *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Wise* v. *Withers*, 3 Cranch.

(U. S.) 331, 337; *Matter of Brown*, 22 Op. A. G. 137; *Matter of Coleman*, 7 Op. A. G. 436; *Matter of Clark*, 2 Op. A. G. 414. The *Runkle* case was also followed in these cases which hold court martial decisions void for jurisdictional defects; *Anderson* v. *Crawford*, 265 Fed. 504 (C. C. A. 8, 1920); *Van Meheran* v. *Sirmyer*, 36 F. (2d) 876 (C. C. A. 8, 1929). *Accord: Tyler* v. *Pomeroy*, 8 Allen 480 (Mass., 1864). *Cf. Ex parte Garland*, 4 Wall. (U. S.) 333.

The reasoning of this Court in *Runkle's* case above is equally applicable to the present case and the attacked probation order should be set aside or at least examined as to the circumstances surrounding its creation upon a trial on the merits of this complaint. *Runkle's* case was specifically approved and applied by this Court in the later case of *McClaughry* v. *Deming*, 186 U. S. 49, 63 *et seq.*, 67 *et seq.* The proceedings in Hammond's case are defective on their face. See *N. L. R. B.* v. *Cherry Cotton Mills*, 98 F. (2nd) 444; Cf. *N. L. R. B.* v. *Ind. & Mich. Elec. Co.*, decided January 18, 1943. The omission of "confirmed by the Secretary of State" as a recital in the probation order and the omission of any signature by the Secretary of State, as specifically required by Section 23i, render the order fatally defective when it is alleged *on oath* that such order was *in fact* never confirmed by the Secretary of State.

Point III.

The rule of the Court of Appeals that the existence of actual malice in a public officer is immaterial and does not subject such officer to any judicial review is contrary to the established law of this Court and is without precedent anywhere.

The Court of Appeals in affirming the dismissal of petitioner's complaint in the instant case announced the following rule of law: "But, in any event, so long as the inter-

pretation placed by an administrative officer upon the law is a reasonable one, and so long as his conduct is both within the scope of his authority and lacking in the elements of caprice and arbitrariness, his motive is immaterial. In other words, the apparent incongruity of *malicious performance of duty,* assuming that malice actually exists, is not sufficient to deprive the performance of duty of its official character or to subject the officer to judicial interference in either his public or his private capacity'' (R. 102).

This rule is entirely unsupported by any authority or precedent, and is flatly to the contrary of the rules long ago laid down by this Court in *Wilkes* v. *Dinsman,* 7 How. 89, and in *Dinsman* v. *Wilkes,* 12 How. 390. The novel and arbitrary nature of this rule of law was fully called to the attention of the Court of Appeals in our petition for rehearing (R. 114-120), but after seventeen days' delay this was nevertheless overruled without opinion (R. 129). We believe that this rule of law alone warrants the acceptance and reversal of the instant case on certiorari by this Court. We do not believe that even in wartime Americans should be left under the misapprehension that their civil liberties are completely at the mercy of minor administrative officials whose powers (according to the Court of Appeals) are vaster than those of the Federal judiciary. See R. 118.

Our argument on this point is fully set out in our petition for rehearing at R. 114-120, and we shall not burden this Court with a repetition of it here. For the convenience of this Court we shall briefly set forth the facts and law of the *Dinsman* v. *Wilkes* cases, decided here in earlier days.

Under the binding authority of *Wilkes* v. *Dinsman,* 7 Howard 89, and *Dinsman* v. *Wilkes,* 12 Howard 390, the charges of malice against respondents Berle and Shaw (R. 9, 11, 18, 22, 24) state a good cause of action against those respondents. In that case this Court decided that on the question of malice only such a case must go to the jury for

determination. The facts there involved the discipline of a marine by his superior, Captain Wilkes of the Navy, when the ship on which they both served was in the South Pacific. This Court in that case said:

"It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty or any species of oppression, founded on considerations independent of public ends.

"*The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office*" (7 How. at 123). * * *

"Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office however elevated or however humble the victim." (Citation of authorities omitted.) (7 How. at 130.)

"But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty or wilful oppression, or, in the words of Lord Mansfield, in *Wall* v. *McNamara,* that he exercised it as 'if the heart is wrong.' (2 Carr & Payne, 158, *note.*) In short it is not enough to show he committed an error in judgment,

but it must have been a malicious and wilful error. (*Harman* v. *Tappenden et al.*, 1 East, 562, 565, *note.*)" (7 How. at 131.)

On second appeal, this Court unanimously reaffirmed the views expressed above, Chief Justice TANEY speaking as follows:

"But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice, or ill-will, or wantonness of power, without giving him redress in the courts of justice." (12 How. at 403.)

"The case, therefore, turns upon the motive which induced Captain Wilkes to inflict the punishments complained of. And this question is one exclusively for the jury, to be decided by them upon the whole testimony. And the rule of law by which they must be governed in making up their verdict is contained in a single proposition. It is this:

"If they believe, from the whole testimony, that the defendant, in all the acts complained of, was actuated alone by an upright intention to maintain the discipline of his command and the interest of the service in which he was engaged, then the plaintiff is not entitled to recover. But, if they find that the punishment of the plaintiff was in any manner or in any degree increased or aggravated by malice or a vindictive feeling towards him on the part of Captain Wilkes, or by a disposition to oppress him, then the plaintiff is entitled to recover." (12 How. at 404-405.)

Or, as the same rule was later stated in a different kind of case, by Mr. Justice HOLMES in a single sentence:

"When such a charge as the present is made, it can be tried fully and fairly only by a court that can hear any and all competent evidence, and that is not bound by findings of the implicated board for which there is any evidence,

always easily produced." (*C. B. & Q. R. R. Co.* v. *Osborne,* 265 U. S. 14, 16.)

See also *Tyler* v. *Pomeroy,* 8 Allen 480 (Mass.), to the same effect.

This rule has never been challenged from ancient days to the present time. The modern rule is well summed up in *Speyer* v. *School District No. 1,* 82 Colo. 534, 538-9, 261 Pac. 858, 860-1, as follows:

"The argument of defendants in support of their demurrer, reduced to its lowest terms, is that no act, otherwise lawful, is made unlawful because done with a bad motive; that the rule in question is lawful, that nothing is alleged against it but motive and so it cannot be enjoined.

"The flaw in this reasoning is in the major premise. It is not universally true. Some acts of public officers became unlawful because of motive, or perhaps more accurately speaking because of purpose.

"Plaintiffs' argument is that any act of a public officer involving discretion, if exercised with malice in bad faith and without a right purpose is unlawful; that the rule in question is a discretionary act and is by the demurrer admitted to have been passed with malice and bad faith, to destroy plaintiffs' business and divert their profits to the pockets of defendants and for no other purpose; that therefore it is unlawful, inequitable and may be enjoined. The argument is sound. Stated in this way, it requires no argument or authority to show that such conduct cannot be sanctioned or permitted. A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or at least must in good faith pursue a right purpose. The authorities are numerous: *Jones* v. *Cody,* 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160; *Lamb* v. *Redding,* 234 Pa. 481, 83 Atl. 362; *Moore* v. *Porterfield,* 113 Okla. 234, 241 Pac. 346; *Yealy* v. *Fink,* 43 Pa. 212, 82 Am. Dec. 556; *Dinsman* v. *Wilkes,* 12 How. 390, 13 L. Ed. 1036; *Wall* v.

McNamara, cited and quoted in *Johnstone* v. *Sutton*, 1 T. R. 493, 536; *Black* v. *Linn*, 17 S. D. 335, 96 N. W., 697, citing many cases; *State* v. *Thornton*, 136 N. C. 610, 48 S. E. 602; *Kansas City* v. *Hyde*, 196 Mo. 498, 96 S. W. 201; *Fertich* v. *Michener*, 111 Ind. 472, 486, 11 N. E. 605, 60 Am. Rep. 709. See also *Smith* v. *Board*, 10 Colo. 17, 13 Pac. 917.

"*Jones* v. *Cody* holds the action of the school board valid, but notes that no malice is charged. In *Lamb* v. *Redding*, the court said, 'if the facts admit of no other conclusion than that the determination of the board has been influenced by other considerations than the public interests, no matter what these may have been, the law will regard it as an abuse of power, a disregard of duty, and it becomes the duty of the courts to interfere for the protection of the public.' pp. 484, 485. We need not here and now go so far as to approve the proposition *in toto*. In *Dinsman* v. *Wilkes* the U. S. Supreme Court, at page 404, makes the whole case turn on the motive or purpose [11] which actuated the officer in doing what it accords him the right to do. So Lord Mansfield in *Wall* v. *McNamara*."

The facts in the above case were that plaintiffs, owners of restaurants located near schools in the city of Denver, alleged that defendants, the District School Trustees, maliciously and solely to ruin plaintiffs' business, passed a rule that all school children, without special permission from their parents, must eat at the school cafeterias. This complaint was dismissed by the lower court, but the dismissal on demurrer was reversed by the Supreme Court of Colorado speaking as above quoted.

In support of this rule it is to be noted that malice, actual or presumed, always aggravates the damages in any case.

---

[11] The distinction between "motive" and "purpose" is not always kept in mind by the courts in their opinions. Wig. Ev. Sects. 117 and elsewhere. (Footnote by the Court.)

See *McCall* v. *McDowell*, 1 Abbott (Fed. Cas.) 212 (C. C. Cal., 1867); *Milligan* v. *Hovey*, 3 Bissell (Fed. Cas.) 13 (C. C. Ind. 1871); *Clark* v. *Kelly*, 101 W. Va. 650, 133 S. E. 369; *Britt* v. *Snodgrass*, 66 Mo. 386, 297-298.

We feel that in the world of chaos of today, this Court should again so declare the law in clear and unmistakable terms.

Conclusion.

Wherefore, we respectfully pray that the petition for a writ of certiorari herein be granted.

Respectfully submitted,

GEORGE W. DALZELL,
Attorney for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

APPENDIX.

I. The Statutes Involved—Title 22 of the United States Code:

Sec. 23f. Board of Foreign Service Personnel for Foreign Service; establishment; duties; recommendation of promotions; composition. There shall be in the Department of State a Board of Foreign Service Personnel for the Foreign Service, whose duty it shall be to recommend promotions in the Foreign Service and to furnish the Secretary of State with lists of Foreign Service officers who have demonstrated special capacity for promotion to the grade of minister. The board shall be composed of not more than three Assistant Secretaries of State, one of whom shall be the Assistant Secretary of State having supervision over the Division of Foreign Service Personnel, who shall be chairman. The Chief of the Division of Foreign Service Personnel and one other member of the division may attend the meetings of the board and one of them shall act as secretary, but they shall not be entitled to vote in its proceedings. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 31, 46 Stat. 1214.)

Sec. 23g. Division of Foreign Service Personnel; assignment of Foreign Service Officers for duty in Division; effect of assignment on eligibility for promotion; nature of duty. No Foreign Service officer below class I shall be assigned for duty in the Division of Foreign Service Personnel. Foreign Service officers assigned to the division shall not be eligible for recommendation by the Board of Foreign Service Personnel for promotion to the grade of minister or ambassador during the period of such assignment or for three years thereafter, nor shall such officers be given any authority except of a purely advisory character, over promotions, demotions, transfers, or separations from the service of Foreign Service officers. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 31, 46 Stat. 1214.)

Sec. 23h. Same; duties; custodian of information affecting Foreign Service officers; efficiency ratings; recom-

mendations for promotion; confidential character of correspondence and records.

The Division of Foreign Service Personnel shall assemble, record, and be the custodian of all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign Service officers, including reports of inspecting officers and efficiency reports of supervising officers. All such information shall be appraised at least once in two years, and the result of such appraisal expressed in terms of excellent, very good, satisfactory, or unsatisfactory, accompanied by a concise statement of the considerations upon which they are based, shall be entered upon records to be known as the efficiency records of the officers, and shall constitute their efficiency ratings for the period. No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto. The Assistant Secretary of State supervising the Division of Foreign Service Personnel shall be responsible for the keeping of accurate and impartial efficiency records of Foreign Service officers and shall take all measures necessary to ensure their accuracy and impartiality. Not later than November 1 at least every two years, the Division of Foreign Service Personnel shall, under the supervision of the Assistant Secretary of State, prepare a list in which all Foreign Service officers shall be graded in accordance with their relative efficiency and value to the service. In this list officers shall be graded as excellent, very good, satisfactory, or unsatisfactory with such further sub-classification as may be found necessary. All officers rated satisfactory or above shall be eligible for promotion in the order of merit to the minimum salary of the next higher class. This list shall not become effective in so far as it affects promotion until it has been considered by the Board of Foreign Service Personnel hereinbefore provided for and approved by the Secretary of State: *Provided*, That this list shall not be changed before the next succeeding list of ratings is approved except in case of extraordinary or conspicuously meritorious service or seri-

ous misconduct and any change for such reasons shall be made only after consideration by the Board of Foreign Service Personnel and approval by the Secretary of State, and the reasons for such change when made shall be inscribed upon the efficiency records of the officers affected. From this list of all Foreign Service officers recommendations for promotion shall be made in the order of their ascertained merit within classes. Recommendations shall also be made, in order of merit, as shown by ratings in the examinations for appointment to the unclassified grade, with commissions also as diplomatic secretaries and vice consuls, of those who have successfully passed the examinations. All such recommendations shall be submitted to the Secretary of State for his consideration and if he shall approve, for transmission to the President.

The correspondence and records of the Division of Foreign Service Personnel shall be confidential except to the President, the Secretary of State, the members of the Board of Foreign Service Personnel, the Assistant Secretary of State supervising the division, and such of its employees as may be assigned to work on such correspondence and records. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 32, 46 Stat. 1214.)

Sec. 23i. Separation of Foreign Service officers from Foreign Service; grounds, retirement pay; annuities and bonuses.

The President is hereby authorized to establish by Executive order, regulations providing for the separation of Foreign Service officers from the Foreign Service, in accordance with the conditions hereinafter prescribed. Any Foreign Service officer so separated from the Foreign Service shall be retired from the Service, after a hearing by the Secretary of State, upon an annuity equal to 25 per centum of his salary at the time of retirement, in the case of an officer over forty-five years of age, or in the case of an officer under forty-five years of age with a bonus of one year's salary at the time of his retirement, either annuity or one year's salary to be payable out of the Foreign Service retirement and disability fund and except as herein provided, subject to the same provisions and limitations as other annuities payable out of such fund; but no

return of contributions shall be made under paragraph (1) of section 21 of this title in the case of any Foreign Service officer retired under the provisions of this section: *Provided, however,* That any officer entitled to the bonus of one year's salary will receive in lieu of such bonus the amount of his contributions and interest under paragraph (1) of section 21 of this title if such amount exceeds one year's salary. Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof, and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State after a hearing accorded the officer, such officer shall be separated from the service with the annuity or bonus provided in this section, but no officer so separated from the service shall receive the said annuity or bonus unless at the time of separation he shall have served at least fifteen years. He shall, however, if he has not served at least fifteen years, have returned to him the full sum of his contributions to the annuity fund, with interest thereon at 4 per centum compounded annually, except as provided in paragraph (c) of section 4 of this Act. The benefits of this section, except, at the option of the Secretary of State, the return of an officer's contributions to the annuity fund, shall not be given to Foreign Service officers separated from the Foreign Service on account of malfeasance in office. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 33, 46 Stat. 1215; Apr. 24, 1939, c. 84, Sec. 4, 53 Stat. 588.)

II. **Regulations Involved—Taken from "The Code of Federal Regulations of the United States of America" (June 1, 1938)—Title 22, Foreign Relations:**

SECTION 76.1. *Definition.* "Foreign Service officer" shall be deemed to denote permanent officers of the Foreign Service below the grade of minister.

* * * * * * *

SECTION 76.3. *Examination for the Foreign Service.* There is hereby constituted a board of examiners, which shall conduct examinations to determine the eligibility of the candidates for the Foreign Service, composed as follows: Three Assistant Secretaries of State to be designated by the Secretary of State, the Chief of the Division of Foreign Service Personnel, and the Chief Examiner of the Civil Service Commission. Members of the board of examiners may, when necessary, designate other persons to serve for them on the board. The following rules are established for the conduct of examinations:

(a) It shall be the duty of the board of examiners to formulate rules for and hold examinations of applicants for commission to the Foreign Service and to determine from among the persons designated by the President for examination those who are fitted for appointment.

* * * * * * *

(c) The examinations shall be both written and oral, * * *

* * * * * * *

(f) No one shall be certified as eligible for appointment who

(1) Is under 21 or over 35 years of age * * *

(2) Has not been a citizen of the United States for at least 15 years before the date of certification;

(3) Is not of good character and habits;

(4) **Is not physically, mentally, and temperamentally qualified for the proper performance of the duties of the Foreign Service;**

(5) Has not been specially designated by the President to take the prescribed examinations to determine eligibility for appointment.

(g) Upon the conclusion of the examinations, the names of the candidates who shall have attained upon the whole examination the required rating will be certified by the board to the Secretary of State as eligible for appointment.

* * * * * * *

(k) New appointments to the service shall be to the grade of Foreign Service officer, unclassified, and no promotions to a higher grade shall be made except in conformity with law and regulations with respect thereto (§§ 76.2, 76.6, 76.7). This provision does not apply to reinstatements or transfers from the Department of State under Section 12 of the Act of February 23, 1931.

SECTION 76.6. [Among the duties of the Board of Foreign Service Personnel is the following:]

(f) To consider controversies and delinquencies among the service personnel and to recommend to the Secretary of State appropriate disciplinary action where required.

(g) To determine, for submission to the Secretary of State after considering recommendations of the Division of Foreign Service Personnel, that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, in order that the Secretary of State may take appropriate action with respect to the separation from the Foreign Service of such unsatisfactory officers in accordance with law (see §§ 76.9, 78.45).
* * *

The members of the board, individually and collectively, shall have authority to examine all records and data of the Division of Foreign Service Personnel. (Sec. 32, 46 Stat. 1214; 22 U. S. C. 23h.)

All action taken by the board shall be strictly nonpartisan and based exclusively upon the records and ratings of efficiency of the officers concerned.

The proceedings of the board shall be strictly confidential, but the chairman shall, within a reasonable time prior to meetings of the board for considering and submitting to the Secretary of State the rating lists from which promotions will be made in accordance with Section 32 of the Act of February 23, 1931 (46 Stat. 1214; 22 U. S. C. 23h), invite the Chairman of the Senate Committee on Foreign Relations and the Chairman of the House Committee on Foreign Affairs, or some committee member designated by the

chairman, to sit with the board through its deliberations without, however, participating in its decisions.

* * * * * * *

SECTION 76.8. *Foreign Service officers' training school.* There is hereby established in the Department of State a Foreign Service officers' training school for the instruction of new appointees.

The Foreign Service officers' training school shall be under the direction of a board composed of the following members, to wit: The Assistant Secretaries of State composing the Board of Foreign Service Personnel, one Foreign Service officer assigned for duty in the Division of Foreign Service Personnel, and the director of the Foreign Service officers' training school. The board will act in all matters with the approval of the Secretary of State.

The director of the school shall be selected by the other members of the school board from among the officers of the Foreign Service, with the approval of the Secretary of State.

Instructors shall be selected from among the qualified officers of the Department of State, the Foreign Service, other executive departments of the Government, and any available sources, in the discretion of the school board.

The term of instruction in the Foreign Service officers' training school shall be considered a period of probation during which the new appointees are to be judged as to their qualifications for advancement and assignment to duty. At the end of the term, recommendations shall be made to the Secretary of State by the Board of Foreign Service Personnel for the dismissal of any who may have failed to meet the required standard of the service.

The Secretary of State is authorized to prescribe rules and regulations for the governance of the Foreign Service officers' training school.

SECTION 76.9. *Separation from the service.* Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standards required for the service, *and such determination has been confirmed by the Secretary of State after notice and hearing as pro-*

vided by law, such officer shall be separated from the service in accordance with the provisions of § 78.45.

* * * * * * *

SECTION 78.45. *Involuntary separation from service.* The Secretary of State is hereby authorized to promulgate rules of procedure for the separation of Foreign Service officers from the Foreign Service, in accordance with the conditions hereinafter prescribed, and also to take all measures necessary to insure equitable administration thereof, in conformity with the purposes of section 33 of the Act of February 23, 1931. Foreign Service officers so separated from the Foreign Service shall be retired from the service, after a hearing by the Secretary of State, upon an annuity * * *. * * * Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof; and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State after a hearing accorded the officer, such officer shall be separated from the service with the annuity or bonus provided in this section * * *.

[Since the above regulations the only further regulations promulgated on these points by either the President or the Secretary of State are contained in the Executive Order of April 20, 1940, 5 Federal Register 1461-1464 inclusive, for April 20, 1940. The only applicable provision as to separations from the Service is the following:]

I-28. *Involuntary separation from Service.* A Foreign Service Officer may be separated from the Foreign Service in accordance with the provisions of Section 33 of the Act of February 23, 1931, 46 Stat. 1215, as amended by Section 4 of the Act of April 24, 1939, 53 Stat. 588 (22 U. S. C., Supp. V, Sec. 23i), and such administrative rules and regulations not inconsistent therewith as may be prescribed by the Secretary of State.

[According to official information conveyed by the office of the Secretary of State to the Director of the Federal Register no such administrative rules and regulations have ever been promulgated by the Secretary of State.

It may be pointed out that under I-5(d) of the same Executive Order, there is the following provision:]

(d) *Probationary Period of New Appointees to the Classified Foreign Service.* New appointees to the classified Foreign Service of the United States shall serve, at such time and for such duration as the Secretary of State may determine, a period of probation in the Foreign Service Officers' Training School herein established.

[This provision plaintiff fully complied with and passed out of his probationary status in June, 1940, and was promoted further in the Foreign Service on August 1, 1940 (Appellant's App. 3).]

[Under date of July 5, 1939, by Executive Order the President added the following provisions to the regulations making leave of absence a *matter of right* subject to regulations to be promulgated by the Secretary of State, which regulations have never yet been promulgated:]

IV-11

Leaves of absence; Officers and employees of the Foreign Service may avail themselves of statutory leave subject to regulations prescribed by the Secretary of State governing the granting of such leave.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR.,

Petitioner,

vs.

CORDELL HULL, ADOLPH A. BERLE, JR., BRECKINRIDGE LONG, ET AL.,

Respondents.

MOTION TO SUPPLEMENT COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes your petitioner, Ogden H. Hammond, Jr., and respectfully moves the Court that upon the consideration of the petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, that the complaint in the foregoing cause be remanded to the District Court of the United States for the District of Columbia whence it originated, with directions to that court to permit petitioner to supplement his complaint herein by the additions thereto of Paragraphs 21A and 21B, all as set forth in the record herein (R. 123), and for such other and further supplemental changes as will enable petitioner to bring forth fully the facts which have super-

vened in this cause since the filing of the complaint herein on March 18, 1941.

Supervening Facts.

The facts regarding the present motion to supplement the complaint as made in the Court of Appeals are fully related in the record (R. 121-128). We will not burden this Court by again setting them out here but we do respectfully call the Court's attention to the fact that the Court of Appeals refused to rule upon this motion to supplement the complaint when it was made before it in open court on the oral argument on March 9, 1942, taken under advisement, left undecided in the opinion of October 12, 1942, and renewed on October 19, 1942 (R. 121-123). We feel that this conduct is not in accordance with usual appellate procedure and should not be approved by this Court.

As pointed out in the motion to supplement the complaint (R. 123), petitioner was stricken from the payroll by respondents Berle and Shaw on April 17, 1941 and from that day to this has received no salary, although admittedly still a duly-commissioned Foreign Service Officer of the United States. His position is unique in the Foreign Service and unique in the history of that service. From March 18, 1941 to December 11, 1942 inclusive, petitioner had no dealing with respondents or any of them save by formal exchange of letters which amount to some sixty altogether (half written by him and half by respondent Shaw), as he was forbidden to undertake any employment or gainful occupation whatever without the express permission of respondents Berle and Shaw as the majority of the Board of Foreign Service Personnel. Leaving aside the other problems raised in this correspondence as immaterial, this Court should be informed that in November 1942 petitioner sought leave of respondents to enlist as a private in the Army of the United States, and after some discussion in the correspondence such leave was formally granted him with full

reservation of all his rights and privileges as a Foreign Service Officer, in late November 1942; pursuant thereto petitioner duly enlisted in the Army of the United States as a private on December 15, 1942.

Immediately prior to his departure from Washington on active Army duty, and on December 9, 1942, petitioner received a formal summons from respondents Berle and Shaw to a "hearing" (allegedly under Section 23i of Title 22, U. S. C.) to be held *in camera* in the Department of State, and which was there held on December 11, 1942. The gist of the charges given to petitioner were (1) That he had sought judicial relief from actions of respondents Berle and Shaw; (2) that he had engaged in correspondence with respondent Shaw; and (3) that he had consumed the time of respondents Berle and Shaw which should have been engaged in other matters. Respondents Berle and Shaw disqualified themselves as judges and a special Board was appointed to hear such matters before whom proceedings went forward on December 11, 1942, and were taken down by a court reporter. Petitioner was permitted to have counsel present but to offer no witnesses and no sworn evidence. Petitioner was not permitted to examine any of the circumstances leading up to the so-called probationary order dated March 7, 1941, and in violation of a promise made to him, neither respondent Berle nor respondent Shaw appeared to testify. Petitioner was not allowed to see or to examine the Department files on which findings adverse to him were to be based. No testimony was in fact taken, aside from an informal statement by petitioner, and petitioner's counsel was not afforded time nor opportunity to file a brief, and in fact allowed nothing except to enter legal exceptions on the record.

The Board's chief reliance was apparently on the prior probation order dated March 7, 1941 (R. 64-65), and on

secret files and data unknown to petitioner and his counsel, and denied them upon demand. Only petitioner and his counsel, aside from State Department officials and the reporter, were present, although petitioner protested the exclusion of the public. *Cf.* opinion of the Court of Appeals herein (R. 101, 102—"a public hearing"). That proceeding is still pending undetermined in the Department of State as of the date of the filing of this petition, and petitioner has applied to have it stayed until after the war under the provision of the Selective Service Act of 1940 as amended, which requires that he be restored at the termination of his military service to the same government position that he held on December 15, 1942—namely to the status of a Foreign Service Officer of the United States. (Whether that status is of satisfactory or unsatisfactory rating will depend upon the decision of this Court in the instant case.) We feel it our duty, in view of the decisions of this Court cited below, to place this full information before it, as these are supervening facts which may influence the decision of this Court in view of the state of the whole record as explained in the foregoing petition and brief, and upon this motion we feel that the interests of justice would best be served by a vacating of the judgment below and a remand of this cause to the District Court to permit the complaint to be supplemented and the entire controversy to be stayed under the Soldiers' and Sailors' Civil Relief Act of 1940 as amended.

The Law.

There is no question as to the power of this Court to enter such judgment or order as the nature of the case and the demands of justice may require. See *Camp* v. *Gress,* 250 U. S. 308, 318; *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* 248 U. S. 9, 18; *Patterson* v. *Alabama,* 294 U. S. 600, 607; *Honeyman* v. *Hanan,* 300 U. S. 14, 25 *et seq.* As this Court said

in *Patterson* v. *Alabama, supra:* "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered" (294 U. S. at 607).

In *Nicholas* v. *United States,* 257 U. S. 71, 73, this Court "on motion" remanded a suit similar in nature to the present one to the Court of Claims for further proceedings and findings of fact before proceeding to enter final judgment on the second appeal. We feel that on the authority of that case such a remand should be had in the instant case. This course of action would appear to be commanded by the case of *Texarkana* v. *Arkansas Gas Co.,* 306 U. S. 188, 203, and the authorities there cited. See especially Rule 15 (d) of the Rules of Civil Procedure. The importance of taking full evidence in an administrative proceeding before final judgment is had was recently given new emphasis by this Court in *National Labor Relations Board* v. *Indiana & Michigan Electric Co., et al.,* decided January 18, 1943.

For these reasons your petitioner respectfully requests that the above case be remanded to the District Court of the United States and upon remand that he be permitted to supplement his complaint and further to proceed as outlined in the foregoing petition and the foregoing motion.

OGDEN H. HAMMOND, JR.,
By GEORGE W. DALZELL,
Attorney for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	16
Appendix	18

CITATIONS

Cases:

American Legion Post No. 90 v. *First Nat. Bank & Trust Co.*, 113 F. (2d) 868	12
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	15
Arizona v. *California*, 283 U. S. 423	15
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288	15
Caha v. *United States*, 152 U. S. 211	11
Chicago Grain Door Co. v. *Chicago, B. & Q. R. Co.*, 137 F. (2d) 101	16
Dismuke v. *United States*, 297 U. S. 167	6
Duke Power Co. v. *Greenwood County*, 91 F. (2d) 665, affirmed on other grounds, 302 U. S. 485	13
Ebertein v. *United States*, 257 U. S. 82	6
Farley v. *Abbetmeier*, 114 F. (2d) 569	14
Fletcher v. *Jones*, 105 F. (2d) 58, *certiorari denied*, 308 U. S. 555	12
General Inv. Co. v. *Lake Shore Ry.*, 260 U. S. 261	16
Gibbs v. *Buck*, 307 U. S. 66	12
Gilchrist v. *Interborough Co.*, 279 U. S. 159	15
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117	14
Greeson v. *Imperial Irr. Dist.* 59 F. (2d) 529	12
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139	13
Johnson v. *United States*, 126 F. (2d) 242	14
Jones v. *United States*, 137 U. S. 202	11
Keim v. *United States*, 177 U. S. 290	5
Kryptok v. *Haussmann & Co.*, 216 Fed. 267	16
Levine v. *Farley*, 107 F. (2d) 186, *certiorari denied*, 308 U. S. 622	6
Longfellow v. *Gudger*, 16 F. (2d) 653	8, 10
Love v. *United States*, 108 F. (2d) 43, *certiorari denied*, 309 U. S. 673	6
Mellor v. *Smither*, 114 Fed. 116	16
Myers v. *Bethlehem Corp.*, 303 U. S. 41	14

Cases—Continued. Page

New York Indians v. *United States*, 170 U. S. 1 ..... 11, 12
New York Security & Tr. Co. v. *Lincoln St. Ry.Co.*, 74 Fed. 67 16
Petersen Baking Co. v. *Bryan*, 290 U. S. 570 14
Polk Company v. *Glover*, 305 U. S. 15 12
Putney v. *Whitmire*, 66 Fed. 385 16
Red Canyon Sheep Co. v. *Ickes*, 98 F. (2d) 308 11
Simmons v. *Peavy-Welsh Lumber Co.*, 113 F. (2d) 812, *certiorari denied*, 311 U. S. 685 13
Spalding v. *Vilas*, 161 U. S. 483 13
United States v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609 11
United States ex rel. Crow v. *Mitchell*, 89 F. (2d) 805 6
United States ex rel. Hall v. *Payne*, 254 U. S. 343 11
United States ex rel. Ness v. *Fisher*, 223 U. S. 683 11
United States ex rel. Taylor v. *Taft*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461 6
Verde River Irrigation & Power Dist. v. *Salt River Valley Water Users' Ass'n*, 94 F. (2d) 936 11
Wallace v. *Ganley*, 95 F. (2d) 364 15
Wilbur v. *United States ex rel. Kadrie*, 281 U. S. 206 11

Statutes:

Civil Service Act of August 24, 1912, 37 Stat. 555 (5 U. S. C. § 652) 10
Act of February 23, 1931, c. 276, 46 Stat. 1207, 1214 (22 U. S. C. §§ 23h, 23i):
Sec. 32 ..... 7, 9, 10, 18
Sec. 33 ..... 9, 10, 20
Federal Declaratory Judgment Act, 48 Stat. 955 (28 U. S. C. § 400) 6

Miscellaneous:

H. Rep. No. 2702 (71st Cong., 3rd Sess.), p. 14 10
21 C. J., Equity, § 666 16
30 C. J. S., Equity, § 429(c) 16

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 690

OGDEN H. HAMMOND, JR., PETITIONER

v.

CORDELL HULL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the District of Columbia (R. 88–89) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 97–103) is reported in 131 F. (2d) 23.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 12, 1942 (R. 104). A petition for rehearing was denied on November 7, 1942 (R. 129). The petition for writ of certiorari

was filed February 1, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, after receiving a preliminary rating of unsatisfactory, a Foreign Service officer of the United States, under the circumstances of this case, is entitled to mandatory, injunctive, and declaratory relief, reinstating him in good standing in the Foreign Service and directing a full hearing to determine the truth of certain charges alleged to have resulted in his unsatisfactory rating.

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in an Appendix (pp. 18–20, *infra*).

STATEMENT

On or about March 22, 1939, petitioner became a Foreign Service officer of the United States (R. 3). After serving as Vice-Consul in Vienna and Leipsig from April 3, 1939 to February 21, 1940, he was transferred to the Foreign Service Officers' Training School in the Department of State in Washington, D. C., from which he graduated in June 1940. From June 1940 until December 27, 1940, he was assigned to duty in the Division of Cultural Relations of the Department of State. On December 27, 1940, petitioner was

granted leave of absence with full pay (R. 3, 56, 62).

On March 7, 1941 the Foreign Service Personnel Board of the Department of State, composed of Assistant Secretaries of State G. Howland Shaw, A. A. Berle, Jr., and Dean Acheson (respondents herein), determined that petitioner's efficiency rating was unsatisfactory within the meaning of Section 33 of the Act of February 23, 1931 (c. 276 46 Stat. 1207, 1215; 22 U. S. C. § 23i), and submitted this determination, together with a review of petitioner's record, to the Secretary of State, who confirmed the determination on the same date (Appendix pp. 21–22, *infra*).

Petitioner was notified of this determination on March 14, 1941 (R. 19), through letters dated March 7, 1941, and signed by respondent Shaw for the Secretary of State (R. 64–66). These letters also informed petitioner that he was assigned as Vice-Consul at Montreal upon the expiration of his leave of absence (which was extended to April 1, 1941 (R. 19)), and that "After a reasonable period of service at that post, your rating will be further considered in due conformity with the provisions of section 33" of the Act of February 23, 1931 (R. 64–66). In a letter dated March 14, 1941, petitioner acknowledged receipt of the notification of unsatisfactory rating, but served notice that he regarded the "purported rating" to be "strictly illegal because the requirements" of see-

tion 32 of the 1931 Act "have not been met" (R. 68). In a letter dated March 16, 1941, petitioner notified Secretary of State Hull that unless he was informed by March 18, 1941, "whether the Department desires an amicable adjustment without litigation" he would instruct his attorneys to institute an action (R. 69–71).

On March 18, 1941, before the expiration of his leave with pay, petitioner filed his complaint in the present case against Secretary of State Cordell Hull, Assistant Secretaries of State Adolph A. Berle, Jr., Breckinridge Long, Dean Acheson, and G. Howland Shaw, and John G. Erhardt, Chief of the Division of Foreign Service Personnel, Department of State, suing each individually and *ex officio* (R. 1–27). The complaint charged that the action of the officers of the Department of State in rating petitioner "unsatisfactory" was illegal because he had not been accorded a hearing or opportunity to reply, alleged to be required by Sections 32 and 33 of the 1931 Act (R. 11–14), because the rating was the result of the fraud and malice of respondents Berle and Shaw (R. 9, 12), and because it was based not upon the criteria specified in the 1931 Act but upon the unfounded charges that petitioner had publicly mimicked the President and had had dealings with an alleged agent of a foreign government (R. 4, 5, 9, 10). The complaint sought mandatory, injunctive, and declaratory relief (R. 24–27), including an order

(1) directing respondents to determine after a full hearing the truth or falsity of the two alleged charges concerning petitioner, (2) adjudging that petitioner "now is in good and satisfactory standing as an officer of the Foreign Service," and (3) declaring respondents' conduct illegal and void (R. 24–27).

On March 29, 1941, the district court dismissed the complaint on the grounds that it failed to state a cause of action and was premature (R. 88, 89). The United States Court of Appeals for the District of Columbia affirmed (R. 104), holding that respondents had fully complied with the procedural requirements of Sections 32 and 33 of the 1931 Act (R. 97–103). Subsequently, the Court of Appeals denied a petition for rehearing (R. 104–120), and a motion to supplement the complaint by alleging that on April 17, 1941, petitioner was dismissed from the Foreign Service without hearing (R. 121–123).

ARGUMENT

I

The employment, supervision, and discharge of personnel in the executive branch of the Government is an administrative matter with which the judiciary will not ordinarily interfere, whether by mandamus to reinstate a dismissed employee or by compelling continued payment of his salary. *Keim* v. *United States,* 177 U. S. 290, 296; *Eber-*

lein v. *United States,* 257 U. S. 82, 84; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *United States ex rel. Crow* v. *Mitchell,* 89 F. (2d) 805 (App. D. C.). The courts will intervene by mandamus only where the administrative officer in discharging the employee has violated some provision of law or has failed to follow the procedure prescribed by statute. *Levine* v. *Farley,* 107 F. (2d) 186 (App. D. C.), certiorari denied, 308 U. S. 622; *Love* v. *United States,* 108 F. (2d) 43 (C. C. A. 8), certiorari denied, 309 U. S. 673; cf. *Dismuke* v. *United States,* 297 U. S. 167, 171, 172. The Declaratory Judgment Act (48 Stat. 955; 28 U. S. C. § 400) did not broaden judicial supervision over the executive departments. *Love* v. *United States, supra.*

In the instant case, petitioner charges that Sections 32 and 33 of the Act of February 23, 1931 (Appendix, pp. 18–20 *infra*) were violated (1) because respondents rated him unsatisfactory on the basis of charges against him without giving him "an opportunity to be represented and heard by counsel" (Pet. 18); (2) because his rating was not confirmed by the Secretary of State; and (3) because respondents Berle and Shaw were actuated by malice against him. But both courts below found from the complaint and exhibits thereto that the facts did not sustain ~~the general obligations~~ these three allegations and consequently the questions of law which petitioner seeks to have

reviewed are not raised. None of his contentions has merit and none presents a question for further review.

1. Section 32 of the Act of February 23, 1931 provides:

> No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto. * * *

Petitioner asserts that his preliminary rating of unsatisfactory was based upon charges that he had publicly mimicked the President and had had improper dealings with a foreign agent, and that he was denied the required "opportunity to reply thereto". The district court found, however that "No charge was filed by or before the Board of Foreign Service Personnel against the plaintiff that adversely affected his efficiency rating or his value in the service or otherwise (R. 91). The court below held (R. 100) that this finding was amply supported by a letter dated March 7, 1941, from respondent Shaw to petitioner (R. 64–65) annexed to the complaint as Exhibit G, in which it was stated:

> It has been determined *from a review of your record* as a foreign service officer that your efficiency rating is unsatisfactory. * * *" [Italics supplied.]

514384—43——2

Since petitioner's preliminary efficiency rating of "unsatisfactory" was based upon his service record and not upon charges, the provision in the 1931 Act concerning the "opportunity to reply" is irrelevant. The term "charges" obviously does not include matters appearing in the officer's service record and the statute makes plain that in giving the rating any "charges" may be disregarded and the rating based on the service record alone.[1]

But even if "charges" adversely affecting petitioner's efficiency rating were taken into consideration, nevertheless it would be plain that the mandate of the statute has been obeyed. Petitioner's complaint and exhibits demonstrate that, after the respondent Berle at an interview related to petitioner the two stories about him and asked for his resignation, petitioner transmitted proof "to show the falsity" of these stories, with supporting affidavits "to the Division of Foreign Service Personnel as he had been requested on November 8, 1940 so to do by the defendant Shaw" (R. 6), stating that his affidavit was "*executed in reply to certain charges against me* which I understand *are under consideration* by the Division of Foreign Service Personnel" (R. 29). [Italics supplied.]

It is clear from the scheme of Sections 32 and 33 that the opportunity to reply to charges re-

[1] Cf. *Longfellow* v. *Gudger*, 16 F. (2d) 653, 656 (App. D. C.).

ferred to in Section 32 does not require a formal hearing with the right to counsel at this stage of the administrative process and therefore that petitioner received all the notice and opportunity to reply that the statute requires. Section 32 directs the Division of Foreign Service Personnel to assemble and record "all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign Service officers," and to appraise such information at least once in two years and give the officer an "efficiency rating" of "excellent, very good, satisfactory, or unsatisfactory," subject to the proviso that no charges against an officer shall be taken into consideration without affording him an *"opportunity to reply."* Section 33 then provides that when a determination of an unsatisfactory efficiency rating has been confirmed by the Secretary of State, the officer is to be so notified, and if after a reasonable period his rating is still found to be unsatisfactory and such finding is confirmed by the Secretary of State *"after a hearing accorded the officer,"* he is to be separated from the service. [See Appendix, pp. 18–20, *infra;* italics supplied.] Thus, the rating given under Section 32 is provisional only. To construe the phrase "opportunity to reply" as requiring that a formal hearing be provided the officer with right to representation by counsel would distort the meaning of a plain statutory term and run counter to a policy expressed in the

legislative history.[2] Hearings at this stage in the administrative procedure would prejudice the flexibility and efficiency of the procedure for selecting and training Foreign Service officers; a public contest between the Department and the officer might hamper a mutually satisfactory adjustment during the probationary period. Consequently, although an adequate opportunity to answer charges must be given, it is essential that service records, including such matters, be first evaluated and that hearings be deferred until the final definitive determination of dismissal is under consideration pursuant to Section 33. The contrast between the term "opportunity to reply" in Section 32 and "after a hearing" in Section 33 confirms this plain interpretation.[3]

Consequently the procedure adopted by the Department of State in the instant case complies with the letter and purposes of the statute. And, in any event, it cannot be regarded as so

---

[2] In the Conference Report of February 17, 1931, to the House of Representatives, on the bill that became the Act of February 23, 1931, it was stressed that the enactment of the bill would "assure the continuance of policies with respect to personnel administration which have been tested and found by experience to be equitable and desirable, *without, however, placing any burdensome restraint upon the executive authority of the President and the Secretary of State over the Foreign Service.*" [Italics supplied.] H. Rep. No. 2702 (71st Cong., 3rd Sess.), p. 14.

[3] Cf. Section 6 of the Civil Service Act of August 24, 1912 (37 Stat. 555; 5 U. S. C. § 652); cf. *Longfellow* v. *Gudger*, 16 F. (2d) 653 (App. D. C.).

clearly erroneous or arbitrary a construction as to warrant judicial intervention by mandamus or injunction. *United States ex rel. Ness* v. *Fisher,* 223 U. S. 683, 691; *United States ex rel. Hall* v. *Payne,* 254 U. S. 343, 347; *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206; *Red Canyon Sheep Co.* v. *Ickes,* 98 F. (2d) 308, 322 (App. D. C.).

2. Petitioner contends (Pet. p. 25) that his rating of unsatisfactory was not confirmed by the Secretary of State and is therefore void. The records of the Department of State reveal, however, that petitioner's efficiency rating of unsatisfactory was confirmed by the Secretary of State on March 7, 1941.[4] As a record of an executive department of the United States, this confirmation may be judicially noticed in the federal courts (*Jones* v. *United States,* 137 U. S. 202, 214, 216, 224; *New York Indians* v. *United States,* 170 U. S. 1, 32; *United States* v. *Brewer-Elliott Oil & Gas Co.,* 249 Fed. 609 (W. D. Okla.)),[5] and by an appellate court even if the

[4] A certified copy of a letter of March 7, 1941, from the Foreign Service Personnel Board to the Secretary of State, reporting petitioner's unsatisfactory rating, and containing the Secretary's confirmation thereof, has been filed with the Clerk of this Court. It is also set out in the Appendix, pp. 21–22, *infra.*

[5] See also *Caha* v. *United States,* 152 U. S. 211, 221; *Verde River Irrigation & Power Dist.* v. *Salt River Valley Water Users' Assn,* 94 F. (2d) 936 (C. C. A. 9); *Red Canyon*

lower court failed to do so.[6] *New York Indians* v. *United States*, 170 U. S. 1, 32; cf. *American Legion Post No. 90* v. *First Nat. Bank & Trust Co.*, 113 F. (2d) 868, 872 (C. C. A. 2). And since the allegation in petitioner's complaint that the unsatisfactory rating was never confirmed by the Secretary of State (R. 13) is in square conflict with facts judicially noticeable by the court, it was not admitted by the motion to dismiss. *Fletcher* v. *Jones*, 105 F. (2d) 58 (App. D. C.), certiorari denied, 308 U. S. 555; *Greeson* v. *Imperial Irr. Dist.*, 59 F. (2d) 529, 530 (C. C. A. 9).

3. Petitioner also advances as ground for certiorari a statement of the court below which he takes to mean that "actual malice in a public officer is immaterial and does not subject such officer to any judicial review" (Pet. pp. 28–34).

Sheep Co. v. *Ickes*, 98 F. (2d) 308 (App. D. C.); *Fletcher* v. *Jones*, 105 F. (2d) 58 (App. D. C.), certiorari denied, 308 U. S. 555.

[6] The district court found as a fact that on March 7, 1941, the Secretary of State confirmed the determination of the Board of Foreign Service Personnel (R. 91). The fact of such confirmation appeared from the affidavits of respondents Berle, Shaw and Acheson, which had been submitted to the district court in opposition to petitioner's motion for a temporary injunction. Even if these affidavits are not part of the record for the purpose of a motion to dismiss the complaint (*Polk Company* v. *Glover*, 305 U. S. 15, 19; *Gibbs* v. *Buck*, 307 U. S. 66), the power of the court to take judicial notice of the confirmation rendered harmless the error, if any, in considering such affidavits. The Court of Appeals made no reference in its opinion to the issue of confirmation by the Secretary of State.

This paraphrase is misleading for the court below in effect simply restated (R. 102) the accepted doctrine that the order of an administrative officer within the scope of his authority, if it was not arbitrary and was justified by a lawful purpose, is not rendered invalid because some other motive was in the officer's mind. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145; *Duke Power Co.* v. *Greenwood County,* 91 F. (2d) 665, 675 (C. C. A. 4), affirmed on other grounds, 302 U. S. 485; cf. *Spalding* v. *Vilas,* 161 U. S. 483, 498.

But that doctrine is not involved here. The statements of the court below in regard to the effect of malice were entirely *obiter.* The district court found (R. 92) and the court below recognized (R. 102), that the exhibits attached to petitioner's complaint contradicted the allegations in the complaint charging malice, fraud, and other improper motives. The conflict between the allegations of the complaint and the exhibits must be resolved in favor of the exhibits. *Simmons* v. *Peavy-Welsh Lumber Co.,* 113 F. (2d) 812 (C. C. A. 5), certiorari denied, 311 U. S. 685. And the motion to dismiss did not admit allegations in the complaint that are mere conclusions unsupported by any facts pleaded (see *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145). Since, therefore, there was no showing of malice, it is immaterial what effect, if any, proof of malice would have had upon the case.

II

The decision below may also be sustained on the ground that petitioner's resort to the courts was premature. The complaint itself reveals that petitioner, at the time of the filing of the complaint, had been given only a provisional unsatisfactory rating which was subject to being superseded, after the probationary period, by an improved rating removing any stigma or prejudice from the prior rating. As pointed out above (p. 9, *supra*), under Section 33, after a Foreign Service officer is rated unsatisfactory, his record must again be reviewed and he must be given a hearing before he can be separated from the service. Hence, petitioner's case had reached only an intermediate stage in the administrative proceeding and it was proper for the district court to deny judicial aid on the ground that he had not exhausted his administrative remedy. *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50; *Farley* v. *Abbetmeier,* 114 F. (2d) 569 (App. D. C.); *Johnson* v. *United States,* 126 F. (2d) 242 (C. C. A. 8).

While an administrative remedy need not be sought if it is inadequate or if to pursue it would be futile (see *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570, 575), no such situation is here presented for it cannot be presumed that the Department of State will refuse petitioner a fair hearing at the appropriate stages of the administrative

proceedings. Cf. *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 357; *Farley* v. *Abbetmeier,* 114 F. (2d) 569 (App. D. C.). Mere allegations of an intent on the part of the administrative officer to deny the relief sought will not avoid the necessity of exhausting the administrative remedy before applying to the courts (cf. *Gilchrist* v. *Interborough Co.,* 279 U. S. 159, 208–209) and unsupported charges of malice and fraud can scarcely be more effective in this regard. In essence, the complaint is based upon an assumed potential invasion of the petitioner's rights, a claim ordinarily insufficient to warrant judicial intervention. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324; *Arizona* v. *California,* 283 U. S. 423, 462; *Wallace* v. *Ganley,* 95 F. (2d) 364 (App. D. C.).

III

Together with his petition, petitioner has filed a motion asking that the cause be remanded to the district court with directions to permit the filing of a supplemental complaint alleging that after the institution of the present action he was dismissed from the Foreign Service in violation of Section 33 (Pet. 45–49, R. 123).[7] The motion should be denied. A supplemental bill may not

[7] If petitioner had in fact been dismissed, there might be some question whether the case is moot. But we deny that he has been dismissed. He is on leave of absence and for that reason some of the relief sought could be awarded, if it were proper, notwithstanding the subsequent events.

be filed where the original bill states no grounds for relief.[8] *Mellor* v. *Smither,* 114 Fed. 116, 120 (C. C. A. 5); *Putney* v. *Whitmire,* 66 Fed. 385, 388 (C. C. S. C.); *New York Security & Trust Co.* v. *Lincoln St. Ry. Co.,* 74 Fed. 67, 68 (C. C. Neb.); *Chicago Grain Door Co.* v. *Chicago, B. & Q. R. Co.,* 137 Fed. 101 (C. C. Ill.); *Kryptok* v. *Haussmann & Co.,* 216 Fed. 267 (E. D. Pa); see also state court decisions collected, 21 C. J., Equity, § 666; 30 C. J. S., Equity, § 429 (c).

Furthermore, the same motion was made and denied in the court of appeals. The motion was addressed to its discretion, *General Inv. Co.* v. *Lake Shore Ry.,* 260 U. S. 261, 281, and since it could reasonably have found that it would be fairer to respondents and make for more orderly conduct of this litigation to require petitioner to file a new bill, there was no abuse of discretion. Consequently, this Court should not in effect reverse the action of the court of appeals by granting an identical motion.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question of general importance is presented. It is respectfully submitted that the petition for certiorari and the

[8] See Point I, *supra,* p. 5.

motion to supplement the complaint should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
ARCHIBALD COX,
ARMAND B. DUBOIS,
Attorneys.

MARCH 1943.

APPENDIX

I. Section 32 of the Act of February 23, 1931, c. 276, 46 Stat. 1214 (22 U. S. C. § 23h) provides:

> The Division of Foreign Service Personnel shall assemble, record, and be the custodian of all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign service officers, including reports of inspecting officers and efficiency reports of supervising officers. All such information shall be appraised at least once in two years and the result of such appraisal expressed in terms of excellent, very good, satisfactory, or unsatisfactory, accompanied by a concise statement of the considerations upon which they are based, shall be entered upon records to be known as the efficiency records of the officers, and shall constitute their efficiency ratings for the period. *No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto.* The Assistant Secretary of State supervising the Division of Foreign Service Personnel shall be responsible for the keeping of accurate and impartial efficiency records of Foreign Service officers and shall take all measures necessary to ensure their accuracy and impartiality. Not later than November 1

at least every two years, the Division of Foreign Service Personnel shall, under the supervision of the Assistant Secretary of State, prepare a list in which all Foreign Service officers shall be graded in accordance with their relative efficiency and value to the service. In this list officers shall be graded as excellent, very good, satisfactory, or unsatisfactory with such further subclassification as may be found necessary. All officers rated satisfactory or above shall be eligible for promotion in the order of merit to the minimum salary of the next higher class. This list shall not become effective in so far as it affects promotion until it has been considered by the Board of Foreign Service Personnel hereinbefore provided for and approved by the Secretary of State: *Provided,* That this list shall not be changed before the next succeeding list of ratings is approved except in case of extraordinary or conspicuously meritorious service or serious misconduct and any change for such reasons shall be made only after consideration by the Board of Foreign Service Personnel and approval by the Secretary of State, and the reasons for such change when made shall be inscribed upon the efficiency records of the officers affected. From this list of all Foreign Service officers recommendations for promotion shall be made in the order of their ascertained merit within classes. Recommendations shall also be made, in order of merit, as shown by ratings in the examinations for appointment to the unclassified grade, with commissions also as diplomatic secretaries and vice consuls, of those who have successfully passed the examinations.

> All such recommendations shall be submitted to the Secretary of State for his consideration and if he shall approve, for transmission to the President.
>
> The correspondence and records of the Division of Foreign Service Personnel shall be confidential except to the President, the Secretary of State, the members of the Board of Foreign Service Personnel, the Assistant Secretary of State supervising the division, and such of its employees as may be assigned to work on such correspondence and records. (Italics supplied.)

II. Section 33 of the Act of February 23, 1931, c. 276, 46 Stat. 1215 (22 U. S. C. § 23i) provides in part:

> * * *. Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof, and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State *after a hearing accorded the officer,* such officer shall be separated from the service with the annuity or bonus provided in this section, but no officer so separated from the service shall receive the said annuity or bonus unless at the time of separation he shall have served at least fifteen years. * * *

V

III. The files of the Department of State contain the following document, a certified copy of which has been filed with the Clerk of this Court:

DEPARTMENT OF STATE,
Washington, March 7, 1941.

To the SECRETARY OF STATE:

In accordance with the provisions of Section 33 of the Act of February 23, 1931, the pertinent part of which reads as follows:

"Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the Service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof, and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State, after a hearing accorded the officer, such officer shall be separated from the Service * * *."

the Foreign Service Personnel Board submits herewith a review of the record of Ogden H. Hammond, Jr., a Foreign Service Officer, Unclassified, on probationary status, whose record has been determined to be Unsatisfactory within the meaning of the Act hereinbefore cited. If, after a reasonable period, his rating continues to be unsatisfactory, it will become necessary to resolve his case in due conformity with the

provisions of Section 33 of the Act of February 23, 1931.

Respectfully submitted,

Foreign Service Personnel Board:

G. HOWLAND SHAW, *Chairman.*
A. A. BERLE, Jr.
DEAN ACHESON.

I hereby confirm the determination by the Board of Foreign Service Personnel that the efficiency rating of Ogden H. Hammond, Jr., a Foreign Service Officer, Unclassified, is Unsatisfactory.

CORDELL HULL,
Secretary of State.

March 7, 1941.

Enclosure:

Review of the Record of Mr. Hammond.

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILED
MAR 12 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 680 690

OGDEN H. HAMMOND, JR.,
Petitioner,

v.

CORDELL HULL ET AL.,
Respondents.

BRIEF FOR PETITIONER IN REPLY TO RESPONDENTS' BRIEF.

GEO. W. DALZELL,
Counsel for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 680

OGDEN H. HAMMOND, JR.,

Petitioner,

v.

CORDELL HULL ET AL.,

Respondents.

BRIEF FOR PETITIONER IN REPLY TO RESPONDENTS' BRIEF.

In their reply brief (Appendix, p. 21) respondents for the first time seek to introduce into the record a letter addressed to the Secretary of State by the Foreign Service Personnel Board on March 7, 1941, bearing the endorsement of the Secretary as of the same date.

This suit was begun March 18, 1941, and the letter and endorsement have been available to the respondents throughout the litigation and cannot have escaped their notice since they took the action upon which they now seek to rely only 11 days before the institution of the suit. This suit was pending in the District Court for 12 days and in the Court of Appeals for 18 months. As appears from page 47 of the petition here, petitioner was never advised of the existence of this endorsement, and, in fact, learns of it for

the first time from respondents' reply brief, although it was at all times within the knowledge and possession of the respondents. The attempt to introduce an additional defense (but not a newly discovered one) at this stage is merely another procedural error in addition to those enumerated at page 6 of the petition.

The authorities cited on pages 11 and 12 of respondents' reply brief do not support the introduction of belated evidence after a complaint has been dismissed, nor are they based on circumstances even remotely similar to the facts in this case.

Petitioner objects to the consideration by the court of this belated exhibit of which he had no previous knowledge.

GEO. W. DALZELL,
Counsel for Petitioner.

DANIEL G. ALBERT,
WILBER STAMMLER,
Of Counsel.